Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 49

LUCKENBACH STEAMSHIP COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 12, 1929

CERTIORARI GRANTED APRIL 29, 1929

(34,073)

(34,073)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 764

LUCKENBACH STEAMSHIP COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 764

LUCKENBACH STEAMSHIP COMPANY, INC., Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, Luckenbach Steamship Company, Inc., respectfully represents:

1. Your petitioner September 28, 1927, presented its petition to the Court of Claims praying for an award of $30,370.94 for carrying the mails in vessels of United States registry from the port of New York to ports of Panama or the Canal Zone and from ports of Panama or the Canal Zone to New York or other port within the United States.

The claim was not based on any formal written contract but was predicated on performance of the services at the request or order of the Postmaster General, followed by the approval by him of the accounts for such performance, aggregating over the period December 1, 1925, to June 1926, inclusive, $82,851.62. Said accounts were based upon a continued course of business existing for a period of years and [fol. 2] continuing to December 1, 1925, by which such mails were to be transported and paid for at the rate prescribed by Section 4009 of the Revised Statutes "for transporting mail between the United States and any foreign port, or between ports of the United States touching at a foreign port," etc.

Said approved accounts were revised and reduced by the General Accounting Office to $52,480.68, or $30,370.94 less than the aggregate sum approved by the Postmaster General.

This suit is for the recovery of the balance of the amount approved by the Postmaster General.

The conclusion of the Court of Claims was that the plaintiff is not entitled to recover. The grounds for so holding are stated in the opinion of the court delivered February 4, 1929, by Judge Sinnott, and are as follows:

1. That the Panama Canal Zone is a part of the United States and that transportation of mails thereto and therefrom is not transportation of mails to any foreign port or place.

2. That insofar as the claim is based on the approval of the accounts by the Postmaster General, irrespective of whether the same was to a foreign or domestic port or place, the plaintiff had offered no evidence of the value of the services.

Your petitioner therefore prays for the issuance of a writ of certiorari to review the judgment of the Court of Claims as involving the following questions:

1. Whether the Canal Zone and the ports and harbors thereof are "foreign" or "domestic" within the true intent and meaning of the Revised Statutes of the United States, Section 4009, and other laws of the United States applicable thereto.

[fol. 3] 2. Whether a course of business extending over a period of years and continuously to December 1, 1925, and payment in accordance therewith, can be departed from by the United States without new agreement or notice, consistently with the good faith of the Government.

3. Whether the approval by the Postmaster General of accounts for carrying the mails is conclusive upon the accounting officers and the courts, especially in the absence of any evidence contradicting the same.

4. Whether the act of July 3, 1926, c. 793, "An Act To amend Section 4009 of the Revised Statutes" (44 Stat. 900) is a declaratory act placing a construction on the meaning of existing laws as well as amending it for the future.

George A. King, William B. King, George R. Shields,
Attorneys for Petitioner.

[fol. 4] [Endorsed:] Supreme Court of the United States, October Term, 1928. No. —. Luckenbach Steamship Co., Inc., Petitioner, v. The United States. Petition for writ of certiorari to the Court of Claims. Filed by George A. King, William B. King, George R. Shields, Attorneys for Petitioner in the Court of Claims.

[fol. 1] IN THE COURT OF CLAIMS

No. H-383

LUCKENBACH STEAMSHIP COMPANY, INC.,

v.

THE UNITED STATES

I. PETITION—Filed September 28, 1927

To the Honorable the Court of Claims:

The plaintiff, Luckenbach Steamship Company, Incorporated, respectfully represents:

I. It is a corporation organized under the laws of the State of Delaware, with principal office and place of business in the City of New York, State of New York.

II. Plaintiff owns and operates, and for a long time has owned and operated, a fleet of merchant vessels duly registered under the laws of the United States and flying the flag of the United States, employed principally in the coastwise and Isthmian trade of the United States. It maintains and has maintained a systematic and regular schedule of sailings between various ports on the east coast and various ports on the west coast of the United States, by way of the Panama Canal. It maintained such service and had such sailings during all of the period hereinafter stated.

[fol. 2] III. For a long time prior to December, 1925, the Foreign Mails Department of the United States Post Office at the Cities of New York, Philadelphia, New Orleans, San Diego, San Pedro, San Francisco and other

cities and ports, both of the east and west coasts of the United States, acting by authority of the Postmaster General, had tendered for transportation, and the plaintiff had accepted and transported, certain classes and kinds of mails of both foreign and domestic origin for transportation and delivery between ports of the United States and those of the Republic of Panama and the harbors thereof for delivery in the Republic of Panama, including the Canal Zone and vice versa. For the transportation of all mails so carried by plaintiff, it had uniformly been paid at the rates fixed and prescribed by the Postmaster General for the carrying of foreign mails by merchant vessels of the United States. These rates had been fixed by orders of the Postmaster General, accepted and acted upon by the plaintiff, and were so fixed from and after October 1, 1925, at eighty (80) cents per pound for first-class mail of domestic origin, eight (8) cents per pound for prints and parcel-post matter of domestic origin, twenty-six and three-tenths (26.3) cents per pound for first-class mail of foreign origin and three and five-tenths (3.5) cents per pound for prints and parcel-post matter of foreign origin, for all mails transported by it on its vessels from ports of the United States to ports of Panama and vice versa.

IV. Beginning with the month of December, 1925, there was likewise tendered it for transportation as theretofore on various of its vessels sailing from New York and other eastern ports to San Pedro and other west coast ports, and [fol. 3] from San Pedro and other west coast ports to New York and other east coast ports, mails of various kinds, including first-class mail, prints and parcel-post matter of domestic origin and closed foreign mails of the three classes all for delivery at Isthmian ports, and plaintiff accepted such mails and transported same on various of its vessels sailing from east coast to west coast ports on, to wit, December 2d, December 9th, December 10th, December 16th, December 24th, December 26th, and December 30th, 1925, January 7th, 1926, January 11th, January 13th, January 21st, January 27th, *January 27th,* February 4th, February 11th, February 13th, February 17th, February 20th, February 24th, February 28th, March 3d, March 10th, March 17th, March 24th, March 31st, April 2d, April 7th, April 14th, April 17th, April 21st, April 28th, May 5th, *May*

5th, May 12th, May 19th, May 20th, May 26th, June 2d, June 5th, June 9th, June 16th, June 20th, June 24th, and June 30th, 1926; and from the west coast to the east coast ports on, to wit, December 3d, 10th, 14th, 17th, 24th, and 31st, 1925, January 2d, 1926, 7th, 9th, 20th, 21st, 23d, 28th, 30th, February 4th, 7th, 10th, 11th, 13th, 17th, 18th, 24th, 25th, 27th, March 2d, 4th, 6th, 9th, 13th, 16th, 23d, 26th, April 1st, *1st*, 3d, 5th, 8th, 10th, 13th, 15th, 20th, 24th, 26th, 29th, May 1st, 6th, 10th, 13th, 20th, 22d, 25th, 27th, 29th, and June 3d, 5th, 10th, 17th, 19th and 24th, 1926.

The kinds and weights of mails so transported by plaintiff were in each case determined by the Postmaster General as represented at the point of shipment and accounts were prepared in the plaintiff's favor by them and approved by the Postmaster General on the basis that the mails so handled and transported were foreign mails that is to say, on the basis of eighty (80) cents per pound for first-class mail of domestic origin, and eight (8) cents per [fol. 4] pound for prints and parcel-post matter of like origin, twenty-six and three-tenths (26.3) cents per pound for first-class foreign closed mail and three and five-tenths (3.5) cents for prints and parcel-post matter of like character. The total of the accounts so prepared and approved for the period December, 1925, to June, 1926, was $82,-851.62, which was the amount correctly due and properly payable to plaintiff for the transportation of mails on said sailings at the rates prescribed by the Postmaster General for the performance of such service.

V. Said accounts, after being approved by the Postmaster General, were transmitted by the Post Office Department to the General Accounting Office for settlement. That office adopted certain arbitrary mileage rates and by the application thereof to the poundage and kinds of mails so transported by the plaintiff reduced the amount of the approved bills in the sum of $30,370.94 and issued its certificates in sums aggregating $52,480.68, leaving a balance due plaintiff of $30,370.94. Against such reduction of the amount due as agreed upon and approved by the Post Office Department, the plaintiff promptly protested, and twice demanded a reconsideration of the decision of the General Accounting Office which was in each instance

refused. Plaintiff transported and delivered the mails under reliance and on the understanding that it would be compensated therefor at the rates prescribed by the Postmaster General for the transportation, on merchant vessels of the United States, of foreign mail, and on such basis it is justly entitled to a balance for the period stated of $30,370.94, more or less, subject to more exact computation by the Post Office Department. The rates fixed by the [fol. 5] Postmaster General and herein claimed were and are just and reasonable rates for the transportation of the mails.

VI. This claim is based upon the following among other statutes and regulations:

Revised Statutes, Sec. 4009, as follows:

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel any sum not exceeding the sea postage, on the mail so transported."

Section 1405, Postal Laws and Regulations. This section in the Postal Laws and Regulations 1924 is a verbatim repetition of Revised Statutes Section 4009, above quoted. This is followed by the following official note:

"In view of the provisions of the Universal Postal Union Convention the term 'sea postage' has no meaning. United States steamships receive not exceeding the whole of the postage collected on the article contained in the mails conveyed by said vessels; and foreign vessels are paid any sum not exceeding the rate of postage fixed for a single maritime transit by the Universal Postal Union Convention in force at such time."

Said Section 1405 was, prior to the date of the accrual of this claim, amended, effective October 1, 1925, by the addition of Paragraph 2 reading so far as material as follows:

[fol. 6] "Section 4009, Revised Statutes of the United States, having provided for the compensation to be allowed for the transportation of mails between the United States and any foreign port by a United States steamship or by a foreign steamship, as any sum not exceeding the sea postage and United States inland postage in the first case, and any sum not exceeding the sea postage in the second case, it is accordingly declared that unless otherwise specially provided the sums to be allowed for the transportation of United States mails on steamships of United States registry shall be eighty (80) cents a pound for mails consisting of letters and post cards, and eight (8) cents a pound for mails consisting of other articles, including parcel post; and for transportation of foreign transit closed mails on steamships of United States registry, twenty-six and three-tenths (26.3) cents a pound (3 francs a kilogram) for mails consisting of letters and post cards, and three and five-tenths (3.5) cents a pound (40 centimes a kilogram) for mails consisting of other articles, including parcel post."

Act of July 3, 1926, 44 Stat. 900, entitled "An Act to amend Section 4009 of the Revised Statutes," said act being a declaratory statute intended and designed by Congress to correct a misconstruction of Section 4009 of the Revised Statutes by the General Accounting Office.

VII. No other action has been had on said claim in Congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets; the plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way [fol. 7] voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States. And the plaintiff claims $30,370.94.

King & King, Attorneys for Plaintiff.

Duly sworn to by Paul Kuhne. Jurat omitted in printing.

[fol. 8] II. General Traverse—Filed Nov. 5, 1927

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission

On December 12, 1928, this case was argued and submitted on merits by Messrs. George A. King and George R. Shields, for the plaintiff, and by Mr. Louis R. Mehlinger, for the defendant.

[fol. 9] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Sinnott, J.**—Filed February 4, 1929

This case having been heard by the Court of Claims upon an agreed statement of facts, signed in behalf of plaintiff by King & King, its attorneys, and in behalf of defendant by Assistant Attorney General Herman J. Galloway, and Louis R. Mehlinger, attorney for defendant, the court makes the following

Special Findings of Fact

I

The plaintiff is a corporation under the laws of the State of Delaware, with its office and principal place of business in the city of New York, State of New York.

II

The plaintiff owns and operates and for a long time has operated, under United States registry, a number of steamships, with regular sailings to and from ports on the east coast of the United States, via the Panama Canal, from and to ports on the west coast of the United States. It operated

such lines and maintained such sailings prior to, during, and since the period December, 1925, to June, 1926, inclusive.

III

Section 1405, Postal Laws and Regulations, edition 1924, with the official note thereto, together with the amendment thereof, effective October 1, 1925, are as set forth in Paragraph VI of the petition, viz.

Section 1405, Postal Laws and Regulations:

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign part, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland [fol. 10] postage; and if by a foreign steamship or by a sailing vessel any sum not exceeding the sea postage, on the mail so transported."

This section in the Postal Laws and Regulations, 1924, is a verbatim repetition of Revised Statutes, section 4009. This is followed by the following official note:

"In view of the provisions of the Universal Postal Union Convention the term 'sea postage' has no meaning. United States steamships receive not exceeding the whole of the postage collected on the articles contained in the mails conveyed by said vessels; and foreign vessels are paid any sum not exceeding the rate of postage fixed for a single maritime transit by the Universal Postal Union Convention in force at such time."

Said section 1405 was, prior to the date of the accrual of this claim, amended, effective October 1, 1925, by the addition of paragraph 2, reading so far as material, as follows:

"Section 4009, Revised Statutes of the United States, having provided for the compensation to be allowed for the transportation of mails between the United States and any foreign port by a United States steamship or by a foreign steamship, as any sum not exceeding the sea postage and United States inland postage in the first case, and any sum not exceeding the sea postage in the second case, it is accordingly declared that unless otherwise specially pro-

vided the sums to be allowed for the transportation of United States mails on steamships of United States registry shall be eighty (80) cents a pound for mails consisting of letters and post cards, and eight (8) cents a pound for mails consisting of other articles, including parcel post; and for transportation of foreign transit closed mails parcel post; and for transportation of foreign transit closed mails on steamships of United States registry, twenty-six and three-tenths (26.3) cents a pound (3 francs a kilogram) for mails consisting of letters and post cards, and three and five-tenths (3.5) cents a pound (40 centimes a kilogram) for mails consisting of other articles, including parcel post."

IV

The Postmaster General, acting through the Foreign Mails Department of the Post Office of New York City, had for a period of years and continuously to December 1, 1925, tendered to the plaintiff and the plaintiff had accepted for transportation and transported mails of the United States and foreign mails for the United States consigned to the Port of Colon, Republic of Panama, and to the Canal Zone of the United States over the Isthmus of Panama. For the transportation of all mails so consigned, transported, and delivered the plaintiff was, on the approval of the Postmaster General, paid at the rates prescribed by the Postmaster General for transportation by United States steamships of mails between the United States and a foreign port.

V

During the period December, 1925, to June, 1926, inclusive, there were delivered to United States vessels operated by the plaintiff, accepted by it for transportation, and transported and delivered by it large quantities of [fol. 11] mails of the United States of various classes for transportation to and delivery at ports at the Panama Canal and/or from ports at the canal to ports in the United States.

VI

The transportation of mails as set forth in Finding V, if properly to be paid for at the rates prescribed by the

Postmaster General for the transportation of United States mail on vessels of the United States between ports of the United States and foreign ports, was worth, and the plaintiff should have been allowed and paid therefor, a total of $82,851.62 for the transportation so involved. For said service the Postmaster General prepared and approved invoices or vouchers aggregating the sum stated, but the General Accounting Office, to which the approved accounts were sent for direct settlement, revised the same to aggregate $52,480.68, or $30,370.94 less than the aggregate sum approved by the Postmaster General, and the plaintiff has received and been paid for the service described only the amounts so allowd by the General Accounting Office.

The action of the General Accounting Office in allowing and paying the lesser amount, and not the amount as approved by the Postmaster General, was the result of a conclusion by it that the applicable rate for the transportation of such mails was that applying to ocean transit of United States mail or foreign closed mail between the United States and its possessions which, for the period involved, it was concluded, was to be fixed only by contractual agreement in accordance with law, and, there being no contract covering such service it was held that the plaintiff was entitled only to a reasonable compensation for such service, which the General Accounting Office determined by comparison with compensation being paid under contracts for the transportation of mails between the United States and its insular possessions to be $52,965.41.

VII

Since July 1, 1926, plaintiff has carried mails of the United States, on vessels of United States registry, between ports of the United States and ports of the Panama Canal Zone for which it has been allowed and paid at the rates prescribed by the Postmaster General for the transportation of mails on United States vessels between the ports of the United States and foreign ports.

Payments after July 1, 1926, at the increased rates prescribed for the transportation of mail between ports of the United States and foreign ports was made pursuant to the provisions of the act of July 3, 1926, 44 Stat. 900, which was construed as not being retroactive.

VIII

If the transportation performed by the plaintiff during the period from December, 1925, to June, 1926, inclusive, as hereinbefore described was properly to be classed as it had been classed before December, 1925, as stated in Finding IV, at the rates prescribed by the Postmaster General for transportation between ports of the United States and [fol. 12] a foreign port, there is due plaintiff for the services performed during the period December, 1925, to June, 1926, a balance of $30,370.94.

CONCLUSIONS OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and therefore the petition is dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

SINNOTT, Judge, delivered the opinion of the court:

This is a suit for the recovery of the sum of $30,370.94 which the plaintiff claims is the difference between the amount certified by the Postmaster General for transportation of various classes of mails of the United States between ports of the United States and the Canal Zone during the period December, 1925, to June, 1926, and the amount allowed and paid by the General Accounting Office for said services. As had been done prior to December 1, 1925, by the Postmaster General, the amount certified for said services was based upon the compensation or rates prescribed by him as being applicable for the transportation of mails by American vessels between the United States and a foreign port.

The General Accounting Office concluded that the rate payable for said services for the period involved was that applying to ocean transit of United States mail or foreign closed mail between the United States and its possessions,

which was to be fixed by contractual agreement in accordance with law. In the absence of a contract covering such services the General Accounting Office held that the plaintiff was entitled to a reasonable compensation which was determined by comparison with compensation being paid under contracts for transportation of mail between the United States and its insular possessions. This amount is $30,370.94 less than the compensation certified by the Postmaster General.

The sole question presented by the agreed statement of facts in this case is whether for the transportation of mails between ports of the United States and the ports in the Panama Canal Zone during the period December, 1925, to June, 1926, the plaintiff is entitled to be paid at rates applicable to the transportation of mails between the United States and a foreign port.

The authority to pay the rates contended for by the plaintiff is found in section 4009 of the Revised Statutes, which is as follows:

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, [fol. 13] any sum not exceeding the sea postage, on the mail so transported."

The question presented for decision is whether or not the ports within the Panama Canal Zone are foreign ports within the meaning of said section 4009 of the Revised Statutes.

Defendant's very comprehensive and able brief refers in detail to the various pertinent acts of Congress, the treaty with Panama relating to the Canal Zone, and the Executive Orders of the President relating thereto, and gives the court a very clear elucidation thereof, of which we are glad to make copious use.

The President of the United States was authorized to acquire for and on behalf of the United States perpetual control of a strip of land extending from the Caribbean Sea to the Pacific Ocean, and the right to use the waters thereon, and to excavate, construct, and perpetually to maintain,

operate, and protect thereon a canal, and jurisdiction over said strip and the ports at the ends thereof, to make such police and sanitary rules and regulations as shall be necessary to preserve order and the public health thereon, and to establish such judicial tribunals as may be necessary to enforce such rules and regulations, and for that purpose there was created the Isthmian Canal Commission. (Act of June 28, 1902, c. 1302, 32 Stat. 481.)

Pursuant to the above authority a treaty between the United States and the Republic of Panama to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific Oceans was concluded and signed at Washington on the 18th day of November, 1903. This treaty was ratified, and proclaimed by the President of the United States on the 26th day of February, 1904. (Treaties and Acts of Congress Relating to the Panama Canal, 1917.)

The parts of said treaty to be considered in the determination of this controversy are as follows:

"Article II

"The Republic of Panama grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. * * *

"Article III

"The Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and

[fol. 14] described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

Pursuant to the ratification of the treaty with the Republic of Panama the President was authorized to take possession of and occupy on behalf of the United States the territory since known as the Canal Zone. (Act of April 28, 1904, c. 1758, 33 Stat. 429.) By section 2 of said act it was provided that until the expiration of the Fifty-eighth Congress, unless provision for the temporary government should sooner be made by the Congress, all military, civil, and judicial powers, as well as the power to make rules and regulations necessary for the government of the Canal Zone, and all rights, powers, and authority granted by the terms of the treaty between the United States and the Republic of Panama should be vested in such person or persons and should be exercised in such manner as the President should direct for the government of said zone, and maintaining and protecting the inhabitants thereon in the free enjoyment of their liberty, property, and religion. Acting under the authority granted in said acts the President in his Executive order of May 9, 1904, stated:

"I have taken possession of and now occupy, on behalf of the United States, the Canal Zone and public land ceded by the Republic of Panama.

* * * * * * *

"If there now be in force within the Canal Zone any franchise granting to any person or persons a privilege to maintain lotteries or hold lottery drawings or other gambling methods and devises of a character forbidden by the laws of the United States, or if the grantee of any such privilege has now the right to sell lottery tickets or similar devices to facilitate the business of the concessionaire, the commission shall enact laws annulling the privileges or concessions and punishing future exercise of the same by imprisonment or fine, or both." (Panama Canal—Executive Orders, 1904-1921, pp. 21, 25.)

Under authority of said Executive order, there was enacted by the Isthmian Canal Commission a code of laws for the government of the Canal Zone. (Laws of Canal Zone, 1904-1914, Annotated 1921; Code of Civil Procedure, Canal Zone, 1907.) Under said statutes and Executive orders the commission exercised general governmental authority until March 31, 1914, when it ceased to exist and was succeeded by the permanent organization authorized by the Panama Canal act. (Act of August 24, 1912, c. 390, 37 Stat. 560.) By section 2 of the latter act all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the zone and the construction of the canal were ratified and confirmed as valid and binding until Congress should otherwise provide.

At the time the act took effect there was a judicial establishment in the zone which had been set up under Act No. 1 of the Isthmian Canal Commission. By this act the judicial [fol. 15] power of the government of the Canal Zone was vested in a supreme court, circuit courts, and municipal courts.

Prior to the passage of the Panama Canal Act the government of the Canal Zone was wholly an executive matter. All powers, executive, legislative, and judicial, were vested in the President. He alone, or through those acting by his authority, made, amended, and repealed laws, created and abolished courts, appointed and removed officials, and generally exercised absolute power over the zone. By Executive order of April 2, 1907, the powers of the governor or chief executive of the zone were vested in the chairman of the commission. Upon completion of the canal this order was changed. Congress assumed the legislative power. While many matters were still left to be regulated by the President, by section 2 of the Panama Canal Act the power formerly possessed by the President was abrogated. By section 4 of the act the President, when in his judgment the canal should be sufficiently advanced to render further services of the Canal Commission unnecessary, was authorized to discontinue the commission and complete, govern, and operate the canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a governor and such other persons as he might deem competent to dis-

charge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. He was authorized to appoint, by and with the advice of the Senate, a governor at a salary of $10,000 per annum. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the canal and Canal Zone were to be appointed by the President or by his authority, removable at his pleasure, and the compensation of such persons was to be fixed by him or by his authority, until Congress should by law regulate the same. (37 Stat. 561.)

By section 7 of the act, as amended by the act of September 21, 1922 (c. 370, 42 Stat. 1004), the authority of the governor was defined as follows:

"That the Governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this act otherwise provided, all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law."

Under various provisions of the law now contained in Title 48 of the United States Code, the President is authorized to grant leases of public lands in the zone (section 1308); to make rules and regulations in matters of sanitation, health, and quarantine (section 1310); to make and change rules and regulations for levying, assessing, and collecting ad valorem, excise, license, and franchise taxes (section 1311); to make and enforce rules and regulations for the public roads and highways and for regulating, licensing, [fol. 16] and taxing the use and operation of automobiles (section 1312); to make rules and regulations to assert and exercise the police power in connection with breaches of the peace or disorderly, indecent, or immoral conduct within the zone (section 1313); to make regulations for the operation of the canal and the locks and approaches thereto

(section 1318); to provide a method for adjustment of claims arising out of personal injuries to employees (section 1320); to make rules and regulations touching the right of persons to enter or remain upon or pass over any part of the Canal Zone (section 1321); to erect, maintain, and operate radio communications, dry docks, repair shops, yards, docks, wharves, etc., and all moneys received from such operations shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States (section 1323); to determine what towns shall exist in the Canal Zone and to subdivide said zone into subdivisions to be designated by name or number and to clearly define their boundaries (section 1341).

In the place of the courts created by the President, acting through the commission, Congress created and established courts and defined their jurisdiction. (Act of September 21, 1922, c. 370, section 1, 42 Stat. 1004.) The jurisdiction in admiralty is the same as is now exercised by the United States district judges and the United States district courts, and the practice and procedure in admiralty is the same as in the United States district courts. (Section 8, Panama Canal act, as amended by act of 1922, section 2, 42 Stat. 1005.) The Circuit Court of Appeals of the Fifth Circuit has jurisdiction to review final judgments of the district courts in all cases in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, and in cases in which the value in controversy exceeds $1,000: in felony cases, and in cases in which the jurisdiction of the trial court is in issue. (42 Stat. 1006; Theoktistou v. Panama Railroad Company, 6 Fed. (2d) 116.) Such appellate jurisdiction is subject to review by the Supreme Court of the United States, as in other cases, and is exercised by the Circuit Court of Appeals in the same manner as in reviewing final judgments of the district courts of the United States. The district judge, district attorney, and the marshal are appointed by the President by and with the advice of the Senate of the United States for a term of four years each, and until their successors are appointed and qualified. (42 Stat. 1006.)

In the various acts of Congress the Canal Zone has been referred to as "Territory of the United States." In the act relating to the liability of common carriers by railroad to their employees, it is provided:

"That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, * * *". (Act of April 22, 1908, c. 149, section 2, 35 Stat. 65.)

In the act known and referred to as the "White Slave Traffic Act," it is provided "That the term 'Territory' as used in this act, shall include the district of Alaska, the insular possessions of the United States and the Canal [fol. 17] Zone." (Act of June 25, 1910, c. 395, section 7, 36 Stat. 827.) In the act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government thereof, it was enacted:

"That all laws and treaties relating to the extradition of persons accused of crime in force in the United States, * * * and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States." (Act of August 24, 1912, c. 390, Section 12, 37 Stat. 569; U. S. Code, Title 48, section 1330.)

In the national defense act relating to the number of the National Guard of the United States, it was enacted that "Provided further, That the word Territory as used in this act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone, * * *." Act of June 3, 1916, c. 134, section 62, 39 Stat. 198.) Congress has enacted that in defining terms the words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States. (Act of March 4, 1917, c. 180, 39 Stat. 1193.) In section 1 of Title XIII, General Provisions, of the espionage act, it is enacted that the term "United States" as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States. (Act of June 15, 1917, c. 30, 40 Stat. 231.) The

words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof. (Act of October 6, 1917, c. 106, 40 Stat. 412.) The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States. (Act of April 20, 1918, c. 59, 40 Stat. 534.) The term "United States" as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States. (Act of May 22, 1918, c. 81, 40 Stat. 559.) The term "United States" includes any State, Territory, or District of the United States, the insular possessions, the Canal Zone, and all lands or waters subject to the jurisdiction of the United States. (Act of July 18, 1918, c. 157, 40 Stat. 913.) The provisions of the national prohibition act were made applicable to the Canal Zone. (Act of October 28, 1919, c. 85, section 20, Title III, 41 Stat. 322.) In the act to regulate the entry of aliens into the United States, Congress provided: "That the term 'United States' as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of November 10, 1919, c. 104, section 3, 41 Stat. 354.)

By executive order of December 5, 1912, the President of the United States by virtue of the authority vested in him by section 3 of the Panama Canal Act of 1912 (37 Stat. 561) declared all land and land under water within the limits [fol. 18] of the Canal Zone to be necessary for the construction, etc., of the Panama Canal, and directed the Isthmian Canal Commission to take possession, on behalf of the United States, of all such land and land under water and to extinguish, by agreement when practicable, all claims and titles of adverse claimants to the occupancy thereof. (Panama Canal—Executive Orders 1904-1921, p. 132.) Subsequently, Congress passed an act removing a certain tract or lots of land situated in the town of Cristobal in said Canal Zone, and authorized the Panama Canal Railroad Company to sell, transfer, and convey said lots or tracts of land with all improvements thereon to any person or persons or associations of persons and retain the

consideration therefor for its own use. (Act of June 5, 1920, c. 231, 41 Stat. 948.) In the act relating to the landing and operation of submarine cables in the United States it is provided, that the term "United States" as used in this act includes the Canal Zone, the Philippine Islands, and all territory, continental or insular, subject to the jurisdiction of the United States. (Act of May 27, 1921, c. 12, section 5, 42 Stat. 8.)

The plaintiff's contention that "The Canal Zone is no part of the United States," but that it is "foreign" within the meaning and intent of the laws of the United States, is not supported by the provisions of Articles II and III of the treaty between the United States and the Republic of Panama.

The treaty under which the United States acquired in perpetuity the use, occupation, and control of the Canal Zone, granted to and vested in the United States forever all the rights, power, and authority in and over said strip of land and lands under water which it could possess as the sovereign thereof to the entire exclusion of the exercise of any such sovereign rights, powers, and authority thereover by the Republic of Panama.

A grant, as used in a treaty, comprehends not only those concessions which are made in form but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession. (Strother v. Lucas, 12 Pet. 410, 435; Bryan v. Kennett, 113 U. S. 179, 192.)

A grant in its own nature amounts to an extinguishment of the rights of the grantor, and implies a contract not to reassert those rights. (State of Illinois v. Illinois Central Railroad Company, 33 Fed. 730-774.)

In all governments of constitutional limitations sovereign power is manifested in three ways: (1) By exercising the right of taxation; (2) by exercising the right of eminent domain; (3) through its police powers. It has been shown that all of these powers have been exercised by the executive and legislative branches of the Federal Government, and the question of whether or not the Canal Zone is a possession of the United States has been definitely determined and the courts are bound by that determination.

Sovereignty is a political question. In Jones v. United States, 137 U. S. 212, it is said that the question of "who is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. [fol. 19] This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." (See also Pearch v. Stranahan, 205 U. S. 265, 273.)

The plaintiff also contends that because certain officers of the United States have for a long time considered and treated the Canal Zone as "foreign" that construction should not now be disturbed. In answer to this contention, we think it sufficient to say that the fact that certain officials of the United States have dealt with the Canal Zone on a basis which does not recognize it as a possession of the United States and treat it as anything but a possession of the United States is not conclusive of its status as a territorial possession of the United States. It is true that beginning with the decision in Downes v. Bidwell, 182 U. S. 244, the Supreme Court has drawn a distinction in the application of the Constitution and Federal statutes between the organized territory of the United States and its possessions, and has in effect held that the Constitution and general statutes may not apply to its "possessions," or that they have a different application to its "possessions" than they have to the "territory of the United States." Consequently, various statutes, the enforcement of which is particularly within the jurisdiction of certain officers, may be so construed as in effect to treat a "possession of the United States" on the basis of "foreign" territory merely because it is neither affirmatively or impliedly included in the particular statute, or statutes may be properly enacted which effectively deal with such possessions on a distinctly different basis from that of the United States or of its territory. It can not be conceded, however, that these circumstances necessarily establish that the Canal Zone is not a possession of the United States, because, as has already been pointed out, Congress has enacted various statutes specifically applicable to the Canal Zone and which deal with it as a "possession of the United States."

There can be no question that the Canal Zone was acquired and is held by the United States under a perpetual grant which for all practical purposes conferred upon and vested in the United States all the rights, power, and authority of a sovereign, and that the United States has exercised full sovereign rights over the Canal Zone ever since the strip of land was acquired.

We think that it must be admitted that all doubt as to the character of the title of the United States in and to the Canal Zone has been conclusively removed by the decision of the Supreme Court in the case of Wilson v. Shaw, 204 U. S. 24, where it was contended that the United States had no power to construct the Panama Canal because the Canal Zone was no part of the territory of the United States. Mr. Justice Brewer, speaking for the Court (pp. 32 and 33), said:

"Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, 'grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the con-[fol. 20] struction, maintenance, operation, sanitation, and protection of said canal.' By Article 3, Panama 'grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement, * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.'

"Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of the canal. *It is hypercritical to contend that the title of the United States is imperfect,* and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate." (Italics ours.)

It is clear from what has been before stated that the Canal Zone under the treaty with the Republic of Panama became and is a possession of the United States, which has always exercised and is now exercising all the powers and rights of sovereignty in the Canal Zone as are being exercised in all of the territory or possessions which are under the control and jurisdiction of the United States, and that ever since it was acquired the Canal Zone has been considered and treated by the legislative branch of the Government as a possession of the United States, and that therefore the Postmaster General was not authorized to pay compensation based upon rates applicable to transportation of mails between the United States and a foreign port, under section 4009, supra, of the Revised Statutes.

The plaintiff further contends that because the Postmaster General for a long time prior to December 1, 1925, had construed section 4009, Revised Statutes, as giving him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails between the United States and a foreign port, such construction should not now be disturbed, "especially when so to do would savor of bad faith and a violation of contract rights." We think the answer to this contention is that an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. (Pierce v. United States, 1 C. Cls. 270; The Floyd Acceptances, 7 Wall. 666.) In the case of Houghton v. Payne, 194 U. S. 88, it is stated (pp. 99-100) that—

"* * * it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. United States v. Graham, 110 U. S. 219; United States v. Finnell, 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute."

Section 4009 of the Revised Statutes was amended by the act of July 3, 1926. (44 Stat. 900.) Plaintiff contends that the above act, amending section 4009, Revised Statutes, [fol. 21] should be construed as a declaratory statute, making clear the meaning of section 4009, Revised Statutes. In other words, that the amendatory act was retroactive. It is well settled that statutes are not to be given a retroactive effect unless the legislative purpose so to do plainly appears. United States v. Magnolia Petroleum Company, decided February 20, 1928, 276 U. S. 160, wherein the Court said:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

Also in White v. United States, 191 U. S. 545, wherein it is said:

"Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men rather than review and affix new obligations to that which has been done in the past.

We cannot accept the explanation that the act of July, 3, 1926, supra, amending section 4009 of the Revised Statutes, was an elucidation of said section, and not an addition to it, as claimed by defendant, but we regard it as a declaration of a new purpose and not the explanation of an old one. Our view is that the amendatory act makes specific provision for the casus omissus in said section 4009, Revised Statutes. See Smietanka v. First Trust & Savgs. Bank, 257 U. S. 602; also Shwab v. Doyle, 258 U. S. 529.

Prior to July 3, 1926, the compensation for transporting the mail between the United States and its possessions was required to be fixed by contractual agreement. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the

compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the plaintiff can not recover the amount claimed in this case or any other sum.

It is therefore ordered and adjudged that plaintiff's petition be dismissed.

GREEN, Judge; MOSS, Judge; GRAHAM, Judge; and BOOTH, Chief Justice, concur.

[fol. 22] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of February, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

[fol. 23] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,073. Court of Claims. Term No. 764. Luckenbach Steamship Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed March 12th, 1929. File No. 34,073.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed:] Supreme Court of the United States, October Term, 192–. Order granting petition for certiorari.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

LUCKENBACK STEAMSHIP COMPANY, INC.,

v.

THE UNITED STATES.

No. 764.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

The claim involves the recovery of the balance of an account approved by the Postmaster General in favor of this company for carrying the mails between the Port of New York and the Isthmus of Panama for the period December 1, 1925, to June, 1926. There was no formal written contract. The accounts were approved by the Postmaster General in the amount of $82,851.62. They were revised and reduced by the General Accounting Office to $52,480.68. This suit is for the recovery of the balance, $30,370.94.

It is based upon the following grounds:

1. That the Canal Zone and its ports and harbors come within the designation of a "foreign port" as defined by Section 4009 of the Revised Statutes of the United States, quoted in petition par. VI, R. 6.

2. That whether that construction be originally sound or not, the course of business between the United States and the company "for a period of years and continuously to December 1, 1925" (Finding IV, R. 10), had treated it as such and the company had for all such services up to that time been paid on the approval of the Postmaster General at the rates prescribed "for transportation by United States steamships of mails between the United States and a foreign port," and that construction should not be departed from.

3. That the approval of the Postmaster General of accounts for carrying mails on his order in the absence of a formal written contract is *prima facie*, if not conclusive, evidence of the value of the services and should be paid for as such in the absence of any evidence to the contrary.

4. That the act of July 3, 1926, c. 793, 44 Stat. 900, "to amend Section 4009 of the Revised Statutes," so as to allow compensation as herein claimed for services in such transportation of mails not only made law for the future, but was a declaratory statute intended to confirm the long-standing construction of Section 4009 of the Revised Statutes by the Post Office Department, with the full acquiescence and sanction of the accounting officers—a construction interrupted only for the short period of seven months covered by the present claim.

These grounds of claim were all overruled by the Court of Claims in an elaborate opinion delivered by Judge Sinnot (R. 12) and judgment rendered dismissing the petition (R. 26).

GROUNDS FOR CERTIORARI.

1. Status of Canal Zone.

Section 4009 of the Revised Statutes as originally enacted provides certain compensation "for transportation of mails between the United States and any foreign port," etc.

Up to December 1, 1925, "mails of the United States and

foreign mails for the United States consigned to the Port of Colon, Republic of Panama, and to the Canal Zone of the United States over the Isthmus of Panama" (Finding IV, R. 10) had been paid for at the rates prescribed by Section 4009 "for transportation by United States steamships of mails between the United States and a foreign port."

The status of the Canal Zone is thus involved.

The articles of the Panama Canal Treaty quoted in the opinion of the court (R. 14) are treated in a learned article by Lester H. Woolsey in the American Journal of International Law, Vol. 20, 1926, pp. 117 to 124. He says:

"It may be observed in the second place from Article III itself that it in terms does not transfer full and complete sovereignty to the United States. There remains a scintilla of sovereignty—a reversionary sovereignty still in the Republic of Panama. On this point Mr. Taft, then Secretary of War, stated before the Committee on Interoceanic Canals, April 18, 1906, that:

"'It (Article III) is peculiar in not conferring sovereignty directly upon the United States, but giving to the United States the powers which it should have if it were sovereign. This gives rise to the obvious implication that a mere titular sovereignty is reserved in the Panamanian Government. Now, I agree that to the Anglo-Saxon mind a titular sovereignty is like what Governor Allen of Ohio once characterized as a "barren ideality," but to the Spanish or Latin mind, poetic and sentimental, enjoying the intellectual refinements, and dwelling much on names and forms, it is by no means unimportant. Therefore, when the question of the form of stamp was to be determined, I had not the slightest hesitation in yielding to the view that we should adopt the system which for a time General Davis had himself adopted before he got United States stamps, of merely purchasing the Panamanian stamps and crossing them with the words "Canal Zone".'

"In the first place, Article II is not an absolute cession, conveyance or transfer of territory. If this had been the intention, no doubt a simple form of cession of territory and dominion would have been employed, as was done in the case of the Louisiana Purchase (Treaty with France, 1803, 8 Stat. 200), and the Alaska Purchase (Treaty with Russia,

1867, 15 Stat. 539), with a provision added as to the allegiance of the inhabitants. Article II is a grant to the United States of the 'use, occupation and control' for a specified purpose and does not purport to convey absolute title. The United States could not sell or transfer the zone or any part of it, because she has not complete title in fee."

Mr. Woolsey concludes (p. 123):

"that it was doubtless not the intention of either party that the United States should hold and administer the Canal Zone as an independent colony or possession of the United States."

True, the opinion of the court points out that Congress exercises complete control over the Canal Zone. This is provided for in the treaty.

While it is true, as pointed out in the opinion of the Court of Claims, that the national prohibition act extends to the Canal Zone, it is also true as pointed out in *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, 127, 128, that "liquor in transit through the Panama Canal or on the Panama Railroad" is specially exempted.

In 1911, Attorney General Wickersham (29 Opns. 194) put a construction on "An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891, 26 Stat. 830.

He states the question to be: "whether the ports of Colon and Panama will, after the canal is constructed, remain foreign ports."

He answers this question (p. 197):

"In my opinion, the service proposed is in substantial compliance with the letter and spirit of the statute, as being between 'ports of the United States' and 'ports of foreign countries.' The word 'port' is not limited in its application to the city which bears the same name, but has been defined as including the entire harbor, within its inclosures and projections of land where ships take refuge and seek shelter.

"Construing the word 'port' as synonymous with 'harbor,' the vessels unquestionably would be carrying the mails

to a foreign port if they entered the harbor, since the treaty reserves to Panama not only the cities of Panama and Colon, but also 'the harbors adjacent to said cities.' In any event, I think that carrying the mails upon such vessels within such close proximity to said cities that they might safely be landed in a small boat would be a substantial compliance with the terms of the act."

A letter of the Postmaster General dated July 23, 1926, addressed to the petitioner (original on file in the Court of Claims), states:

"that this department has always considered service to the Canal Zone as being in the same category as that to a foreign country and has stated the compensation on that basis," etc.

5 Comp. Gen. 647 says (p. 648):

"It appears from the foregoing that Congress has generally treated the Canal Zone as 'foreign' to the United States, any exception being for specified purposes only."

2. Effect of Long-Continued Construction.

The construction thus adopted by the Attorney General in 1911 that carrying the mails from New York to the Isthmus of Panama was carrying "foreign" mails should be determinative against a sudden departure from that rule made by the General Accounting Office in opposition to the views of the Postmaster General.

The Attorney General's construction was given in 1911. It was acted on up to December 1, 1925.

The rule in such a case is stated in *United States* v. *Alabama Great Southern Railroad*, 142 U. S. 615, 621:

"We think the contemporaneous construction thus given by the executive department of the government and continued for nine years through six different administrations of that department—a construction which though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in

this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

The latest statement of the rule is in *United States* v. *Minnesota*, 270 U. S. 181, 205 (opinion by Mr. Justice Van DeVanter).

3. Postmaster General's Approval of Accounts.

By Finding VI (R. 11) "For said service the Postmaster General prepared and approved invoices or vouchers aggregating the sum stated," etc.

This suit is for the amount of the vouchers approved by the Postmaster General. Without regard to whether the service was foreign or domestic, it should be paid for at the rate fixed by the Postmaster General. The Court of Claims at the end of its opinion criticises plaintiff for not offering independent evidence of the value of the services, saying (R. 25, 26):

"In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service."

The true rule is the contrary. These vouchers were not only approved by the Postmaster General; they were prepared in his office. The vouchers described in the findings of fact as approved by the Postmaster General constitute

the highest evidence of the value of the service. The Postmaster General is charged by law with all the duties touching the transportation of the mails of the United States. By Revised Statutes, Section No. 396, Par. 9th, "It shall be the duty of the Postmaster General" "to superintend the general business of the department and execute all laws relative to the postal service." He may, and frequently does, order the performance of service without any formal contract. He also approves such service after it has been rendered and fixes the compensation for the same. When he does so, the presumption is very strong that the amount fixed by him for the value of the service is correct.

In *Salomon* v. *United States,* 19 Wall. 17, this court held (p. 20):

"when the quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

Much more strongly does this rule apply where it is a head of a department certifying to the value of services rendered at his request without any formal contract.

In this case, as in *St. Louis, Brownsville & Mexico Railway Co.* v. *United States,* 268 U. S. 169, 177, it may be said:

"The claim here in question was for an amount fixed by the tariff. A bill for the full sum was presented to the appropriate officer. The deduction made by the Auditor was without warrant in law."

The rule is elementary in the jurisprudence of the Court of Claims and was thus stated by Chief Justice Richardson, who had been Secretary of the Treasury, in *McCann* v. *United States,* 18 C. Cls., 445, 447:

"A voucher given by an officer of the Government, in the

regular and ordinary course of his business, for services performed or articles purchased by his order for the public service within the scope of his authority and the line of his duty unimpeached, is *prima facie* evidence of indebtedness on the part of the United States as therein stated."

Under this very provision of Revised Statutes, Section 4009, the action of the Postmaster General in fixing the rate was held conclusive in *Pacific Mail Steamship Co.* v. *United States,* 28 C. Cls. 1.

The amount fixed by the Postmaster General for the services was therefore conclusive.

4. Act of 1926 Declaratory.

The act of July 3, 1926, c. 793, 44 Stat. 900, "An Act to amend Section 4009 of the Revised Statutes," provided "That Section 4009 of the Revised Statutes is amended to read as follows:"

The amendment restored the old construction. Thus from at least the time the Attorney General gave his opinion in 1911 until December 1, 1925, these mails were carried on the basis claimed by the petitioner in this case, and Congress at the first opportunity after learning of the decision of the Comptroller General to the contrary, restored the rule that had been prevailing under the Attorney General's opinion of 1911.

The report of the Committee on Post Office and Post Roads of the House of Representatives on the bill (House Report No. 1305, 69th Congress, 1st Sess.) refers to the decision and disapproves it:

"If the Comptroller's decision went into effect under the present law it would be necesary to advertise the mail to our insular possessions and war vessels and be given to the lowest bidder, etc., and make a formal contract. Under the foreign mail arrangement, the Post Office Department just offers it to any boat that is ready to go out at any time the mail is ready to go, and such boats carry it at the pound

rate without any contract at all. It would also cause two classes of mail and a domestic rate for each."

The act of 1926 is thus more in the nature of a declaratory law.

As said in a still later report made in 1928, House Report No. 1788, 70th Congress, 1st Sess., speaking of the act of 1926:

"The purpose of the act was not to reduce the rates paid to American ships, but to clarify the law."

A statute in similar terms was so construed by this court in *Bailey* v. *Clark*, 21 Wall. 284, 288:

"This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising, it would undoubtedly have so provided in terms."

These statutes are entitled to the most liberal possible construction. Revised Statutes, Section 4009, and its amendment of 1926, should be construed in the light of the public policy declared by other acts. The Merchant Marine Act of 1920, approved June 5, 1920, c. 250, Sec. 1, 41 Stat. 988, and confirmed by the Merchant Marine Act of 1928, approved May 22, 1928, c. 675, Sec. 1, 45 Stat. 689, declare it to be the public policy of the United States to do whatever may be necessary to develop and encourage the maintenance of a merchant marine.

CONCLUSION.

This writ of certorari is properly allowable as involving important questions:

1. The status, national and international, of the Canal Zone.

2. A departure from a long continued statutory construction on the faith of which rights had been built up.

3. The credit due to vouchers and statements of account prepared and approved by the Postmaster General for the carriage of mails.

4. The action of Congress in enacting a statute clarifying and declaring the meaning of an earlier statute by reverting to the long continued construction.

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Attorneys for Petitioner.

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CHARLES ELMORE

Supreme Court of the United States.

October Term, 1929.

LUCKENBACH STEAMSHIP COMPANY, a Corporation, Petitioner,
v.
THE UNITED STATES.

No. 49.

On Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Petitioner.

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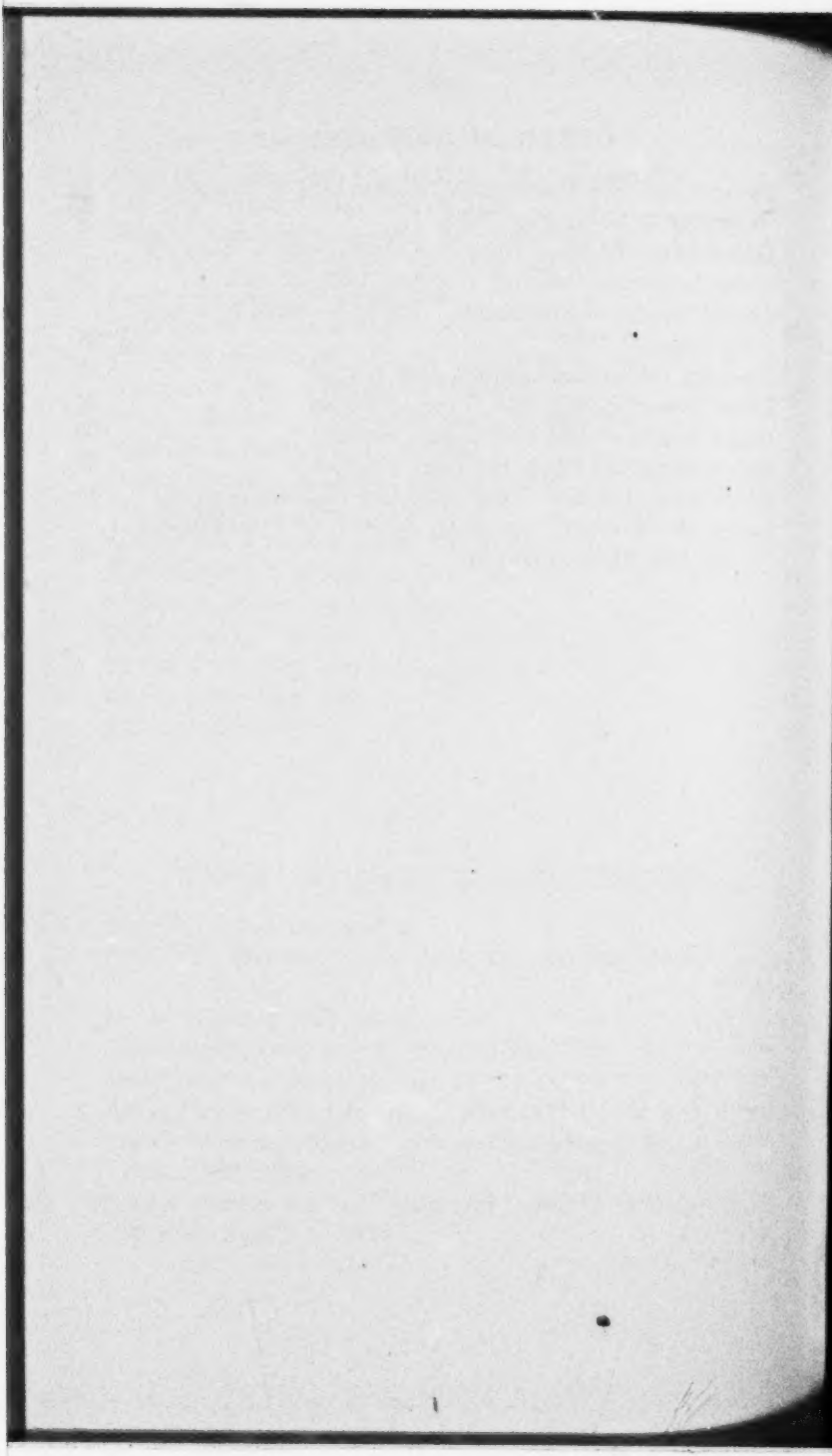
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Supreme Court of the United States.

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On Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

I. Jurisdiction of This Court.

(1) The judgment to be reviewed was rendered by the Court of Claims, February 4, 1929 (R. 12, 26) and writ of certiorari was granted by this court April 29, 1929. The decision of the lower court is not yet reported (see opinion, R. 12).

(2) The claim advanced was as follows:

Plaintiff alleged that it transported the mails under orders of the Postmaster General between the United States and the ports of the Canal Zone from December, 1925, to June, 1926, and that the Postmaster General prepared and approved vouchers for such service on the basis of transportation of mails to foreign ports, as uniformly for a long time theretofore, and transmitted these to the General Accounting Office; that said office adopted certain arbitrary rates reducing the amounts of the vouchers and that plaintiff has received only said amounts. It claims the full amounts approved by the Postmaster General, a difference of $30,370.94 (R. 3–6).

The Court of Claims ruled that carrying mails to ports of the Canal Zone was not carrying mails to "foreign ports" and that plaintiff was entitled only to a reasonable compensation for the service rendered and that there was nothing to show this to be in excess of the amounts paid (R. 24–26).

(3) The jurisdiction of this Court is involved by reason of a grant of certiorari by this Court April 29, 1929.

II. Statement of the Case.

THE FACTS FOUND.

The Postmaster General had for a period of years and continuously to December 1, 1925, tendered to the petitioner, and the petitioner had transported, mails of the United States to the port of Colon, Republic of Panama, and to the Canal Zone. For the transportation of all such mails the petitioner was, on the approval of the Postmaster General, paid at the rates prescribed by the Postmaster General under Section 4009, Revised Statutes (*post*, p. 5), for the transportation by United States steamships of mails between the United States and a foreign port (Finding IV, R. 10).

From December 1, 1925, to June 30, 1926, there were delivered to United States vessels operated by the petitioner and transported by it large quantities of mails of the United States for delivery at ports at the Panama Canal and from ports at the Canal to ports in the United States (Finding V, R. 10).

The mails so carried, if paid at the rates prescribed by the Postmaster General for carrying mails on vessels of the United States between ports of the United States and foreign ports, would have entitled the petitioner to compensation amounting to $82,851.62. Vouchers aggregating said sum were approved by the Postmaster General and sent to the General Accounting Office for direct settlement. That office revised the accounts to make them aggregate $52,480.68 or $30,370.94 less than the amount approved by the Postmaster General. The petitioner has been paid only this amount (Finding VI, R. 10–11).

The action of the General Accounting Office in allowing and paying the lesser amount, and not the amount approved by the

Postmaster General for the seven-months' period, was the result of a conclusion by that office that the applicable rate for transportation of mails between ports of the United States and the Canal Zone was not that applying to the carrying of mails between ports of the United States and foreign ports but that applying between ports of the United States and its possessions. As mails of the latter class can only be carried under contract, it was held that the petitioner was entitled only to reasonable compensation, there being no contract. This compensation was determined by a comparison with compensation being paid others under contracts for the transportation of mails between the United States and its insular possessions (Finding VI, R. 11).

By the act of July 3, 1926 (44 Stat. 900, *post*, p. 6), Section 4009, Revised Statutes (U. S. Code, Title 39, Sec. 654) was amended so as to leave no question of the right of the Postmaster General to fix the compensation for transporting such mails at the rates previously fixed by him. After this, petitioner was paid as before December 1, 1925 (Finding VII, R. 11).

GROUNDS OF DECISION OF THE COURT OF CLAIMS.

1. The Court decided that the petitioner was not entitled to recover the difference between the amounts allowed by the Postmaster General and by the General Accounting Office on the following grounds (Opinion, R. 12–26):

(1) The Canal Zone is a part of the United States and its ports are not "foreign" within the meaning of the laws of the United States (R. 21, 24).

(2) The fact that officers of the United States had "for a long time considered and treated the Canal Zone as 'foreign'" "is not conclusive of its status" (R. 22).

(3) The fact that the Postmaster General "for a long time prior to December 1, 1925, had construed Section 4009, Revised Statutes, as giving him authority to pay for the trans-

portation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails" "between the United States and a foreign port," does not affect petitioner's rights because "an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage" (R. 24).

(4) In the absence of a contract entered into in accordance with the statutory requirements governing the carrying of domestic mails, "the only payment which may be authorized for the services is their reasonable value." In the absence of proof that the services were worth more than has been paid therefor, the plaintiff "can not recover the amount claimed in this case or any other sum" (R. 25–26).

(5) The act of July 3, 1926 (*post*, p. 6), amending Section 4009 of the Revised Statutes so as to allow the compensation denied by the General Accounting Office is not retroactive but "makes specific provision for the *casus omissus* in said Section 4009, Revised Statutes" (R. 25).

SUMMARY OF ARGUMENT.

1. The ports of Panama and the Canal Zone are "foreign ports" within the meaning and for the purposes of Section 4009, Revised Statutes (U. S. Code, Title 39, Sec. 654; printed, *post*, p. 5).

2. Whatever the merits of the question as an original construction, the contemporaneous and continued practical construction by the Postmaster General (as well as by other executive authorities, as will be shown hereafter) that ports of the Canal Zone are "foreign" within the meaning of this particular statute and for its purposes, followed by service and payment "for a period of years and continuously to December 1, 1925" (Finding IV, R. 10), should not be departed from to the unsettlement of rights acquired under this construction.

3. If the petitioner, having rendered the service without a written contract, is entitled to a reasonable compensation for the services, the amount fixed by the Postmaster General on the basis of the rates accepted by the parties for like service over a long period of years is *prima facie*, if not conclusive, evidence of reasonable compensation.

4. The act of July 3, 1926 (44 Stat. 900; *post*, p. 6), definitely establishing for the future the rate prevailing to December, 1925, and setting aside the rate fixed by the General Accounting Office decision not only made law for the future, but declared the concurrence of Congress in the construction by the Postmaster General of the existing Section 4009.

LAWS AND REGULATIONS.

The laws and regulations here brought into question are as follows:

Section 4009, Revised Statutes (U. S. Code, Title 39, Sec. 654):

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage except as otherwise provided by law; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported."

Postal Laws and Regulations (Edition 1924, revised to October 1, 1925), Section 1405:

"Section 4009, Revised Statutes of the United States, having provided for the compensation to be allowed for the transportation of mails between the United States and any foreign port by a United States steamship or by a foreign steamship, as any sum not exeeeding the sea postage and United States inland postage in the first case, and any sum not exceeding the sea postage in the second case, it is accordingly declared that unless otherwise specially provided, the sums to be allowed for the transportation of United States mails on steamships

of United States registry shall be eighty (80) cents a pound for mails consisting of letters and postcards, and eight (8) cents a pound for mails consisting of other articles, including parcel post; and for transportation of foreign transit closed mails on steamships of United States registry, twenty-six and three-tenths (26.3) cents a pound (3 francs a kilogram) for mails consisting of letters and post cards, and three and five-tenths (3.5) cents a pound (40 centimes a kilogram) for mails consisting of other articles, including parcel post."

Act of July 3, 1926, Ch. 793, 44 Stat. 900:

"An Act to Amend Section 4009 of the Revised Statutes.

"*Be it enacted*, etc., That section 4009 of the Revised Statutes is amended to read as follows:

"Sec. 4009. (a) Except as provided in subdivision (b), for transportation of the mails, (1) between the United States or its Territories or possessions and any foreign country, (2) between the United States and its possessions or its naval or military forces abroad, or (3) between any such possession or naval or military forces and any other such possession or naval or military forces, the Postmaster General may allow, in the case of a vessel of the United States, compensation not in excess of the amount of the postage collected on the mail transported on such vessel, and in the case of a foreign vessel, compensation not in excess of the sea-transit rates prescribed from time to time by the Universal Postal Union Convention.

"(b) The provisions of subdivision (a) of this section shall not limit the compensation for transportation of mail which the Postmaster General may pay under contracts entered into in accordance with the provisions of Section 4007 of the Revised Statutes or Section 24 of the Merchant Marine Act, 1920.

"(c) In the case of mails transported between the United States or its Territories or possessions and any foreign country and in the case of mails transported between the United States and its possessions or its naval or military forces abroad, or between any such possession or naval or military forces and any other such possession or naval or military forces, payment for such transportation shall be made out of the appropriation for the transportation of foreign mails."

TREATY PROVISIONS.

"Convention between the United States and the Republic of Panama for the construction of a ship canal to connect the

waters of the Atlantic and Pacific oceans," ratified November 18, 1903 (33 Stat. Part 2, p. 2234), Article II:

"The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant."

Article III (p. 2235):

The Republic of Panama grants to the United States all the rights, power and authority within the zone * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

Article XIV (p. 2238):

"As the price or compensation for the rights, powers and privileges granted in this convention by the Republic of Panama to the United States, the Government of the United States agrees to pay to the Republic of Panama the sum of ten million dollars ($10,000,000) in gold coin of the United States on the exchange of the ratification of this convention and also an annual payment during the life of this convention of two hundred and fifty thousand dollars ($250,000) in like gold coin, beginning nine years after the date aforesaid."

III. Argument.

(I) CANAL ZONE PORTS "FOREIGN" WITHIN THIS STATUTE.

Article II of the Panama Treaty, *supra*, grants "in perpetuity the use, occupation and control" of the Canal Zone for

designated purposes and Article III grants all the rights, power and authority within the Zone, "which the United States would possess and exercise *if it were* the sovereign of the territory." (Note the omission in the opinion below, R. 21, of the words here italicized.) Article XIV provides an annual payment, *quasi* rent. This is obviously very different in legal theory and in ultimate possibility, however it may be in present practice, from transferring all sovereign power to the United States. It leaves the Canal Zone in a different category from Hawaii, Porto Rico, and the Philippines, where sovereignty was ceded (Joint Resolution of July 7, 1898, 30 Stat. 750; treaty proclaimed, April 11, 1899, 30 Stat. 1755, 1756). The ports of the Canal Zone are not domestic ports of the United States in the same sense as those of Hawaii, Porto Rico and the Philippines, for the ultimate sovereignty of the latter ports is not foreign.

This difference is strongly accentuated in the series of statutes enumerated in the opinion below (R. 18–20) where special words were repeatedly used to include the Canal Zone within their provisions or within the term "United States" or "Territory of the United States" or "Territory."

The specific question whether the Canal Zone ports are "foreign ports" has not previously been before this court, but it has been discussed by a number of authorities.

In a learned article by Lester H. Woolsey, appearing in Vol. 20, pp. 117–124, of the American Journal of International Law, it is said, pp. 120–121:

"From this summary of the provisions of the treaty of 1903, it will be observed that all of the articles of that treaty, except possibly Article III, relate in some obvious manner to the construction, maintenance, operation, sanitation and protection of the Panama Canal. Therefore, the history of the relation of the United States to the Isthmus, from 1846 to the present time, has centered around this great undertaking, and this fact should, according to Vattel, give a clue to the meaning of Article III of the Canal Treaty. This reasoning leads to the deduction that the rights of sovereignty of the United States under Article III are limited to those necessary or convenient for carrying out the project which was the

object and purpose of the negotiators of the treaty. From this point of view the doing of anything which does not further the construction, maintenance, operation, sanitation and protection of the canal would be beyond the powers given to the United States in the Canal Zone. In accordance with this view the United States has turned back to Panama certain lands not necessary for the canal enterprise.

"It may be observed in the second place from Article III itself that it in terms does not transfer full and complete sovereignty to the United States. There remains a scintilla of sovereignty—a reversionary sovereignty still in the Republic of Panama. On this point Mr. Taft, then Secretary of War, stated before the Committee on Interoceanic Canals, April 18, 1906, that:

> "'It [Article III] is peculiar in not conferring sovereignty directly upon the United States, but giving to the United States the powers which it would have if it were sovereign. This gives rise to the obvious implication that a mere titular sovereignty is reserved in the Panamanian Government. Now, I agree that to the Anglo-Saxon mind a titular sovereignty is like what Governor Allen, of Ohio, once characterized as a "barren ideality," but to the Spanish or Latin mind poetic and sentimental, enjoying the intellectual refinements, and dwelling much on names and forms, it is by no means unimportant. Therefore, when the question of the form of stamp was to be determined, I had not the slightest hesitation in yielding to the view that we should adopt the system which for a time General Davis had himself adopted before he got United States stamps, of merely purchasing the Panamanian stamps and crossing them with the words "Canal Zone."
>
> "'The truth is that while we have all the attributes of sovereignty necessary in the construction, maintenance, and protection of the canal, the very form in which these attributes are conferred in the treaty seems to preserve the titular sovereignty over the Canal Zone in the Republic of Panama, and as we have conceded to us complete judicial and police power and control over the zone and the two ports at the end of the canal, I can see no reason for creating a resentment on the part of the people of the Isthmus by quarreling over that which is dear to them but which to us is of no real moment whatever.'"

The author continues (p. 121):

"In the third place, while Article III on the one hand seems to grant to the United States the 'exercise' of 'all the rights, power and authority' within the Canal Zone which the United States would possess and exercise if it were the sovereign to the entire exclusion of the exercise of such rights by Panama, other articles on the other hand appear to restrict the exercise of a general right of sovereignty by the United States."

Again, pp. 121–122:

"In the first place, Article II is not an absolute cession, conveyance or transfer of territory. If this had been the intention, no doubt a simple form of cession of territory and dominion would have been employed, as was done in the case of the Louisiana Purchase (Treaty with France, 1803, 8 Stat. 200), and the Alaska Purchase (Treaty with Russia, 1867, 15 Stat. 539), with a provision added as to the allegiance of the inhabitants. Article II is a grant to the United States of the 'use, occupation and control' for a specific purpose and does not purport to convey absolute title. The United States could not sell or transfer the zone or any part of it, because she has not complete title in fee."

Mr. Woolsey goes on to say (p. 123) that it doubtless was not the intention of either party that the United States should hold and administer the Canal Zone as an independent colony or possession of the United States.

In a recent book, "The Isthmian Highway," by Hugh Gordon Miller, this statement is made (p. 221):

"The chief legal advisers of the United States have recognized our peculiar position in Panama. In 1909 Attorney General Bonaparte said the Canal Zone was not 'a territory' of the United States, 'but a place held by us for a very special and peculiar purpose.' Later in the same year Acting Attorney General Wade Ellis said:

" 'The Canal Zone is not one of the possessions of the United States within the meaning of the Tariff Act of 1909, but rather a place subject to the use, occupation and control of the United States for the purpose of constructing and maintaining a ship canal connecting the waters of the Atlantic and Pacific Oceans.' "

It is thus clear that from the very date of the Treaty with Panama, the anomalous status of the Canal Zone with national control but ultimate foreign sovereignty has continued to be the subject of discussion and interpretation and of uncertainty in its application to varying conditions.

(2) LONG CONTINUED CONSTRUCTION AND USAGE.

It is therefore not strange that the Attorney General and heads of various departments and bureaus have from time to time been called upon to decide whether the Canal Zone and its ports were "foreign" within the meaning of certain laws. They have uniformly held them to be so.

The Attorney General.

The opinion of Attorney General Bonaparte, referred to above in the quotation from the book "The Isthmian Highway," is apparently not among the published opinions. That of Acting Attorney General Wade H. Ellis is reported in 27 Op. Atty. Gen. 594. The latter opinion answered negatively the question whether the Canal Zone was "a possession" of the United States within the meaning of the Tariff Act of August 5, 1909 (36 Stat. 11), providing for duties on goods "from any foreign country into the United States or into any of its possessions" (with exceptions not here necessary to enumerate). If not a "possession" for tariff purposes, it is difficult to see why the Canal Zone should be classed as such for mail carrying purposes.

Attorney General Wickersham was later called on to construe the provisions of "An Act to provide for ocean mail service between the United States and foreign ports and to promote commerce," approved March 3, 1891, 26 Stat. 830, the particular question being "whether the ports of Colon and Panama will, after the Canal is constructed, remain foreign ports." He answered this question as follows (29 Op. Atty. Gen. 194, 196):

"It appears from the papers transmitted by you that it will be more convenient for the vessels contracting for this mail service to use principally the Government docks, which are being constructed at Cristobal on the Atlantic side and Balboa on the Pacific side; and the question arises whether by using these docks, which are in close proximity to but outside the limits of the cities of Colon and Panama and within the Canal Zone, the vessels would be carrying mails to foreign ports. It is stated in this connection that docking the large vessels at the cities of Colon and Panama would result in serious loss of time, and that the actual call at these places could be obviated by the use of a tender to meet the vessels upon entering the 'harbor adjacent to these ports' to receive and deliver the mail in Colon and Panama, the vessels then proceeding to the Government docks at Cristobal and Balboa.

"It has been held that the purpose of the act of March 3, 1891, is 'to promote the carriage of the ocean mails in ships of American register, and thereby to promote ocean commerce in American bottoms,' and that this statute 'designed to promote foreign commerce, is entitled to a liberal construction with a view to carrying out the purpose of its enactment.' (20 Op. 98, 101).

"In my opinion, the service proposed is in substantial compliance with the letter and spirit of the statute, as being between 'ports of the United States' and 'ports of foreign countries.' The word 'port' is not limited in its application to the city which bears the same name, but has been defined as including the entire harbor, within its enclosures and projections of land, where ships take refuge and seek shelter. (*United States* v. *Morel*, 26 Fed. Cases, 1310; *DeLonguemere* v. *New York Fire Insurance Company*, 10 Johns. (N. Y.) 120, 124; *Mobile Marine Dock Co.* v. *McMillan*, 27 Ala. 77, 99; *Martin* v. *Hilton*, 9 Metc. 371, 378.) Construing the word 'port' as synonymous with 'harbor' the vessels unquestionably would be carrying the mails to a foreign port if they entered the harbor, since the treaty reserves to Panama not only the cities of Panama and Colon, but also 'the harbors adjacent to said cities.' In any event, I think that carrying the mails upon such vessels within such close proximity to said cities that they might safely be landed in a small boat would be a substantial compliance with the terms of the act."

A later decision in the same volume (29 Op. 269) holds:

"A vessel loading at the Colon Wharf of the Panama Railroad Co., and subsequently entering a port of the United States should be regarded as coming from a 'foreign port or place' within the meaning of Section 36 of the tariff act of August 5, 1909 (36 Stat. 111), and the Republic of Panama, for the purposes under consideration, should be treated as sovereign over such wharf."

DEPARTMENT OF LABOR.

The Department of Labor, putting a construction on the immigration laws, says (Dept. of Labor, Bureau of Immigration, Immigration Laws and Rules of March 1, 1927, foot p. 112):

"Ports of the Panama Canal Zone shall be deemed to be foreign ports, and any vessel entering and clearing from any such port shall be subject to all the immigration laws, rules and regulations applicable to vessels arriving in the United States from any foreign port or place."

TREASURY DEPARTMENT.

The Internal Revenue Office in answering an inquiry by the Panama Railroad as to the status of its employees says:

"Treasury Department
Washington.

July 7, 1926.

Panama Rail Road Company,
24 State Street,
New York, N. Y.
Att. Mr. V. M. Newton, Acting Third Vice Pres.

Reference is made to your letter dated June 4, 1926, in which you inquire as to whether the officers of your vessels who perform personal services for more than six months during the year beyond and without the territorial limits of the United States are entitled to exemption from taxation on their earned income from sources without the United States.

"In reply you are advised that the officers employed on your vessels who are American citizens and who are bona fide non-residents of the United States (that is, are away from the United States), for more than six months during the taxable year, are exempt from Federal income tax with respect to their compensation for services rendered without the terri-

torial limits of the United States. The term 'United States,' as used in a geographical sense, in addition to continental United States, includes the Territories of Alaska and Hawaii.

Respectfully,

D. H. BLAIR,
Commissioner."

COMPTROLLER GENERAL.

In 5 Comp. Gen. 647, he says (p. 648):

"It appears from the foregoing that Congress has generally treated the Canal Zone as 'foreign' to the United States, any exception to that general rule being for specific purposes only."

CONCURRENT EXECUTIVE CONSTRUCTION.

Thus three departments—Justice, Labor and Treasury—beside the Post Office Department and the General Accounting Office treat the Canal Zone when described in United States Statutes as coming under the head of "foreign" territory. It would be difficult to marshal a greater array of departmental authority in support of any legal construction.

EFFECT OF EXECUTIVE CONSTRUCTION.

A long continued line of decisions of the Supreme Court has settled that a course of departmental construction will be regarded as controlling, especially where to depart therefrom at a later date would infringe private rights or violate contractual or quasi-contractual obligations of the United States.

In *United States* v. *Moore*, 95 U. S. 760, the court said (p. 763):

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 210; *United States* v. *The State Bank of North Carolina*, 6 Pet. 29; *United States* v. *McDaniel*, 7 id. 1. The officers concerned are usually

able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In *United States* v. *Johnston*, 124 U. S. 236, the court said (pp. 252, 253):

"What was said in *United States* v. *Jones*, 18 How. 92, 96, may be repeated here, as applicable to accounts which have been finally acted upon by a head of department, invested with authority in the premises. There the question was as to the right of accounting officers to review the action of the Secretary of the Navy in approving certain disbursements made by an officer of the Navy in conformity with the orders of the Secretary. This court said: 'The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments.'

* * * * * * * * *

"In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous. *Edward* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Moore*, 95 U. S. 760; *Hahn* v. *United States*, 107 U. S. 402; *United States* v. *Philbrick*, 120 U. S. 52, 59."

In *Schell's Executors* v. *Fauché*, 138 U. S. 562, the court said (p. 572):

"It is an acknowledged principle of law that if rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public such rights ought not to be impaired or disturbed by a different construction, and if, notwithstanding Treasury Regulation Number 384, requiring protests to be special in each case, a practice has grown up in the different ports of entry of receiving prospective protests, the annulment of such practice might entail serious consequences upon importers who had acted upon the faith of its validity. As early as 1803 it was held by this court in *Stuart* v. *Laird*, 1 Cranch. 299, 309, that a practical construction of the Constitution that the justices of the Supreme Court

had a right to sit as circuit judges, although not appointed as such, was not open to objection. 'It is sufficient to observe,' says the court, 'that practice and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest and ought not now be disturbed.' In all cases of ambiguity the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

The case of *Alabama Great Southern Railroad*, 142 U. S. 615, affirming 25 C. Cls. 30, is particularly strong on this point. This court said (p. 621):

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government."

It was said in the same case by the Court of Claims, opinion by Judge Nott, 25 C. Cls. 45–46:

"Every man is bound to know the law and the true interpretation thereof, but where the responsible officers of the

Government give a construction to a statute, upon the faith of which a contractor renders a service and receives his pay, can the Government subsequently say that the payment was illegal, and open the transaction, and recover back the money? In the case of disbursing officers it has been held that where payments were made in pursuance of the rulings of accounting officers, the Government as between the disbursing officer and itself, is estopped from setting up that the payments were illegal (*Hartson's* case, 21 C. Cls. 451). Is there any difference in principle between the case of a disbursing officer who paid out money on the faith of the Treasury Department's ruling and of a carrier who carried the mails on the faith of the Postmaster General's construction of a statute? Ordinarily the construction given to a statute by a Department is favorable to the Government; that is to say, favorable to itself and unfavorable to the other party, who is seeking to draw upon its limited appropriations. Yet, where there is a foundation of ambiguity to stand upon, the courts have not hesitated to say that the contemporaneous construction by executive officers called upon to interpret a statute, and appointed to carry it into effect, is entitled to great respect, and ought not to be overruled without cogent reasons, although a different construction might be given to the statute if the question were altogether new. (*Brown* v. *The United States*, 113 U. S. 568.)"

The most recent statement is found in *United States* v. *Minnesota*, 270 U. S. 181, where the court said (p. 205):

"The Act of 1860 was construed as we here construe it by Secretary Delano in 1874, 1 Copp's P. L. L. 475, and by Secretary Schurz in 1877, 2 Id. 1081; and their construction was adopted and applied by their successors up to the time of this suit and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction. *United States* v. *Burlington and Missouri River R. R. Co.*, 98 U. S. 334, 341; *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572; *Louisiana* v. *Garfield*, 211 U. S. 70, 76; *United States* v. *Hammers*, 221 U. S. 220, 228; *Logan* v. *Davis*, 233 U. S. 613, 627."

ACTION OF PARTIES.

But not only have officers of the government uniformly construed the treaty provisions as leaving the Canal Zone "foreign" for certain purposes, including mail transportation, but, in reliance upon advice of the Attorney General in analogous cases, the Postmaster General over a period of years has dealt with the petitioner and the petitioner has dealt with him on that basis, the petitioner carrying mails and being paid on such basis. It would seem that the ruling of the Attorney General was ample authority for the course pursued and, as held in *Smith* v. *Jackson*, 246 U. S. 388, 389, "should have put the subject to rest."

WILSON v. SHAW, 204 U. S. 24.

The court below (R. 23) stresses the above case as decisive here. The question decided was entirely different. Nothing is more dangerous than to adopt general expressions used in one case as decisive of the issue in another.

(3) REASONABLE COMPENSATION.

But even if it be concluded that the ports of the Canal Zone are not "foreign" ports within the meaning of this statute as determined by the Postmaster General, the question remains, what is the proper domestic rate?

The court below says (R. 25–26):

"Prior to July 3, 1926, the compensation for transporting the mail between the United States and its possessions was required to be fixed by contractual agreement. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the plaintiff can not recover the amount claimed in this case or any other sum."

The payment of reasonable compensation for services rendered without a written contract is in accordance with the rule laid down by this Court in *Clark* v. *United States*, 95 U. S. 539, where it is said (p. 543):

"Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents, which, as shown by the findings, was the period of eight days. This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose. Neither party thought fit to adduce any other."

Two Determinations Here.

There are two determinations of reasonable compensation in this case:

(a) The Postmaster General determined it on the basis of the rates paid for transportation of mails to foreign ports.

(b) The Comptroller General determined it "by comparison with compensation being paid under contracts for the transportation of mails between the United States and its insular possessions" (Finding VI, R. 11).

The court below ignored the Postmaster General's determination and accepted the Comptroller General's.

Postmaster General's Determination Preferable.

The Postmaster General's should have been accepted for the following reasons:

(1) Plaintiff carried mails not only to the ports of the Canal Zone but also "to the Port of Colon, Republic of Panama" (Finding IV, R. 10). For the latter service it received beyond doubt the rate fixed for "foreign ports" and this, as shown by Attorney General Wickersham's opinion, cited, *ante*, p. 12, when delivery was made at the Government Dock at Colon, the very same dock at which mails for the Canal Zone were

delivered. The Postmaster General, exercising the discretion conferred by Rev. Stat., Sec. 4009, *ante*, p. 5, allowed the same rate for the mails to the Canal Zone as paid for the mails to Colon in Panama. It was reasonable to do this; it would have been unreasonable to do otherwise. To hold now any other as a reasonable rate is to declare the rates to Panama unreasonable.

(2) The vouchers showing the higher rate were not only approved by the Postmaster General; they were prepared in his office (Finding VI, R. 11). These vouchers as so approved constitute the highest evidence of the value of the service. The Postmaster General is charged by law with all the duties touching the transportation of the mails of the United States. By Revised Statutes, Section 396, Par. 9th, "It shall be the duty of the Postmaster General" "to superintend the general business of the department and execute all laws relative to the postal service." He may, and frequently does, order the performance of service without any formal contract. He also approves such service after it has been rendered and fixes the compensation for the same. When he does so, it is to be presumed that the amount fixed by him for the value of the service is correct, far more so than can be the amount calculated by the Comptroller General.

In *Salomon* v. *United States*, 19 Wall. 17, this court held (p. 20):

"* * * when the quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

Much more strongly does this rule apply where it is a head of a department certifying to the value of services rendered at his request without any formal contract.

The rule is elementary in the jurisprudence of the Court of Claims and was thus stated by Chief Justice Richardson, who had been Secretary of the Treasury, in *McCann* v. *United States*, 18 C. Cls. 445, 447:

"A voucher given by an officer of the Government, in the regular and ordinary course of his business, for services performed or articles purchased by his order for the public service within the scope of his authority and the line of his duty unimpeached, is *prima facie* evidence of indebtedness on the part of the United States as therein stated."

Under this very Section 4009, the action of the Postmaster General in fixing the rate was held conclusive in *Pacific Mail Steamship Co.* v. *United States*, 28 C. Cls. 1.

This is a case for the special application of the language of this Court in *United States* v. *Jones*, 18 How. 92, 99, quoted with approval in *United States* v. *Johnston*, 124 U. S. 236, 252, *ante*, p. 15:

"The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments."

(3) Petitioner furnished services without other agreement than that implied from a course of dealing over several years. The service was invited and rendered on the assumption that it would be performed on the terms theretofore applying. The previously existing rates, in the absence of anything to the contrary beyond the opinion of an accounting officer, are reasonable rates for the particular service here involved and should be so accepted here. In *Bowers Hydraulic Dredging Co.* v. *United States*, 211 U. S. 176, a construction claimed by the contractor as the proper one to be placed on a contract was held inadmissible because a previous contract had received a contrary construction. In *Ceballos* v. *United States*, 214 U. S. 47, the decision was in favor of the contractor on the ground that a previous contract had been construed as contended by the contractor.

(4) LATER ACT DECLARATORY OF LAW.

Hardly had the decision on this question been rendered by the Comptroller General than Congress corrected it by legislation.

The act of July 3, 1926 (44 Stat. 900), "An Act to Amend Section 4009 of the Revised Statutes," is quoted in full, *ante*, p. 6. It removed all doubt of the power of the Postmaster General to pay for transportation of the mails to the ports of the Canal Zone at the same rates as to "foreign ports." Payments were thereafter so made (Finding VII, R. 11).

Plaintiff contends that this act is to be construed as a disapproval of the ruling of the Comptroller General, not only making law for future time but also supporting the past action of the Postmaster General under the law already in existence. It is easy to say (opinion, R. 25) that "statutes are not to be given a retroactive effect unless the legislative purpose so to do plainly appears," but declaratory acts are not uncommon and acts will be so construed where good reason appears. Such a construction was given in *Clark* v. *Bailey*, 5 Fed. Cases, 856, Federal Case #2814, 12 Blatchf. 156, in an internal revenue case, the court saying:

"It is not an insignificant circumstance, that, by the act of June 6, 1872, 17 Stat. 256, Congress expressly enacted, that the words 'capital employed' in said 110th section 'shall not include moneys borrowed or received from day to day, in the usual course of business, from any person not a partner of, or interested in, the said bank, association, or firm.' It is possible to say that this statute changed the law. But it seems to me that the language is better adapted to declare the construction and meaning of the law. It would have been easy and appropriate, if that alone was the design, to say that hereafter money so borrowed shall not be liable to the tax. My opinion, that the terms employed did not include money so borrowed, renders it unnecessary to do more than say that this further enactment is not inconsistent with that view, and may well have been passed in order to remove any doubt theretofore entertained on the subject."

This court, affirming the judgment, more briefly said, *Baily* v. *Clark*, 21 Wall. 284, 288:

"This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising it would undoubtedly have so provided in terms."

In *McNamara* v. *United States*, 28 C. Cls, 416, 421–422, a declaratory effect was placed upon a similar act giving another reading to a prior statute:

"By the act of 1891 Congress declared that Section 1285 of the Revised Statutes should read as provided in said act. This form of legislation—the giving a different reading to a prior act—is peculiar to Congress, so far as we have observed. It is reasonable to presume, from such phraseology, that the intention was that the latter act should be construed as having effect from the date of the prior act, as though such prior act had been originally so framed, * * *.

"So far as such legislation, thus construed, affects the liability of the United States, and does not interfere with the vested rights of individuals and is not penal, it is within the constitutional power of Congress and it is not obnoxious to the objections to retroactive laws, especially when such laws are remedial."

This statute is of the kind described in *In re McKenzie*, 142 Fed. 383, C. C. A., 8th Cir., where it was said (p. 388):

"The true purpose and the designed effect of statutes, declaratory of the common or existing law and preservatory of the rights vested thereunder, is to dispel doubt and to make plain the fact that such laws and rights shall remain undisturbed."

That the act in question is a declaratory act, intended to disapprove the construction of the Comptroller General, is shown by the reports of the Committees of both Houses of Congress on the bill which became the act of July 3, 1926. Reference to these with a view to determining the scope of statutes passed on the strength of such reports, is approved in *Binns* v. *United*

States, 194 U. S. 486. See also *Duplex Company* v. *Deering*, 254 U. S. 443, 474.

The report of the House Committee on Post Offices and Post Roads thus refers to the Comptroller's decision (House Report #1305, 69th Cong., 1st Sess., *italics ours*):

"*The Comptroller General of the United States has recently ruled* that under the present law all service for carrying mail to and from our island possessions and our military forces at foreign ports shall be provided as domestic mail service subject to the requirements applying thereto and must all be paid for out of the appropriations for inland transportation by steamboat or other power-boat routes.

"The Post Office Department has heavy mail between New York and Porto Rico, between Porto Rico and the Virgin Islands, and between San Francisco and Hawaii under contract as domestic mail service and paid for such transportation out of the appropriations for inland transportation by steamboat or other powerboat routes. Other mails, however, have heretofore been carried in the same manner as foreign mails between New York and the Marine Corps at Port au Prince, Haiti, between New York and the Canal Zone, between San Francisco and Guam, from the United States war vessels in Asiatic waters to San Francisco, and other miscellaneous sailings between New York and the Virgin Islands, and this particular service has been paid for along with foreign mails out of the appropriations for transportation of foreign mails. Generally on these sailings the steamship carries both mails for the island possession or military force in connection with mails for foreign countries."

The report concludes (*italics ours*):

"There are two rates on foreign mail; one is to American vessels and one to foreign vessels. American vessels are paid 80 cents a pound for first-class mail and for other matter 8 cents a pound. Foreign vessels are paid 26.3 cents a pound for first-class mail and 3½ cents a pound for other mail. The Post Office Department tries to give the mail to American vessels in accordance with the instructions of Congress.

"*If the comptroller's decision went into effect under the present law* it would be necessary to advertise the mail to our insular possessions and war vessels and be given to the lowest bidder, etc., and make a formal contract. Under the foreign mail

arrangement the Post Office Department just offers it to any boat that is ready to go out at any time the mail is ready to go and such boats carry it at the pound rate without any contract at all. It would also cause two classes of mail and a domestic rate for each.

"The domestic service department is strictly limited to a contract while in the foreign service Congress authorizes the Postmaster General to contract for not to exceed a certain rate to American vessels and at a certain rate to foreign vessels, and that is all the contract there is and the vessels just go ahead and carry the mail."

The same statements are repeated in Senate Report #1096, 69th Cong. 1st Sess. On the strength of these reports the bill became a law.

In a still later report made in 1928 the purpose of the act of July 3, 1926, is thus referred to (House Report #1788, 70th Cong., 1st Sess.; also Annual Report Postmaster General for the fiscal year ending June 30, 1927, pp. 46–47; *italics ours*):

"Prior to the act of July 3, 1926, it had been customary for many years to pay American registry ships 80 cents per pound for carrying letters and post cards to foreign countries and 8 cents for other articles, including parcel post. The act referred to provides that the Postmaster General may allow to vessels of United States registry compensation not in excess of the amount of postage collected on the mails transported on such vessels. *The purpose of the act was not to reduce the rates paid to American ships but to clarify the law.* However, the General Accounting Office holds that we can not continue to pay the 80 and 8 cent rates unless it is shown that the postage collected from mails dispatched on each trip of a ship is not less than the rates fixed. In order that the great and useless amount of work involved in this ascertainment may be obviated, it is recommended that the law be changed so as to authorize payment to American ships at not exceeding the rates referred to above, which have been in effect for at least 50 years."

These reports show that the act was due to the recent ruling of the Comptroller General that mails "heretofore carried in the same manner as foreign mails between," among other places, New York and the Canal Zone, "shall be provided as

domestic mail service subject to the requirements applying thereto." The report says: "If the Comptroller's decision went into effect under the present law,"—plainly implying that the Comptroller General's decision should not go into effect at all, if the proposed law passed. Finally there is the distinct declaration that "the purpose of the act was not to reduce the rates paid to American ships but to clarify the law."

All such services as herein claimed for were paid at the foreign mails rate for many years prior to December, 1925, and at the same rate since the act of July 3, 1926. A disallowance of this claim would be a decision that an exception is to be made from December, 1925, to June, 1926, to a rule earlier and later in force. The act of July 3, 1926, was a legislative clarification of the law not only for the future but also for the past.

IV. CONCLUSION.

Summarizing the arguments above made, it is submitted:

1. The ports of the Canal Zone are "foreign" within the meaning and for the purposes of the mail transportation statute, Rev. Stat. Sec. 4009 (*ante*, pp. 7–10).

2. If there is doubt about this, such doubt should be solved by the wide-spread, uniform contemporaneous and long-continued executive construction (*ante*, pp. 11–17).

3. If the ports of the Canal Zone are not "foreign," to the extent stated above, then petitioner is entitled to a reasonable compensation for service rendered. The best evidence of this is the finding of the Postmaster General in accordance with the rates paid for like service over prior years (*ante*, pp. 19–21).

4. The act of July 3, 1926, expresses the Congressional intent that payment for carrying the mails to ports of the Canal Zone should be at the rates for carrying the mails to foreign ports (*ante*, pp. 22–25).

When the Canal Zone came under United States jurisdiction,

the Postmaster General decided, under a statute many years in existence, supported therein by uniform contemporaneous executive decisions, that the ports of the Canal Zone were foreign ports for mail transportation purposes and fixed the pay accordingly. Plaintiff carried the mails continuously on this basis until the Comptroller General held after December, 1925, that the Postmaster General had been continuously in error, refused plaintiff for services already performed the mail pay which it had been continuously receiving and fixed a lower rate. Congress at its next session restored the former rate of pay but in the interim plaintiff received the lower rate fixed by the Comptroller General rather than the Postmaster General. However ingeniously this reduction may be argued as a matter of strict law, the common sense of justice is revolted at it. It is believed that this brief has pointed out a path of reconciliation between law and justice.

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Supreme Court of the United States.

October Term, 1929.

LUCKENBACH STEAMSHIP COMPANY, a Corporation, *Petitioner*,
v.
THE UNITED STATES.

No. 49.

On Certiorari to the Court of Claims.

66 C. Cls. 679.

ASSIGNMENTS OF ERROR.

While the brief for petitioner already filed is thought to show with sufficient certainty the errors relied on under the headings "Grounds of Decision of the Court of Claims" (pp. 3, 4) and "Summary of Argument" (pp. 4, 5), yet in order to comply fully with the requirements of the rules in that regard the petitioner now formally assigns the following errors in the judgment of the Court of Claims:

1. That said court held that the Canal Zone is a part of the United States and that its ports are not "foreign" within the meaning of the laws of the United States, whereas said court should have held that the ports of Panama and the Canal Zone are "foreign ports" within the meaning and for the purposes of Section 4009, Revised Statutes, U. S. Code, Title 39, Sec. 654.

(Brief for petitioner, p. 3, par. 1; p. 4, par. 1.)

2. That said court held that the fact that officers of the United States had "for a long time considered and treated the Canal Zone as 'foreign'" is not conclusive of its status,

whereas said court should have held that such long continued action was conclusive.

(Brief for petitioner, p. 3, par. 2; p. 4, par. 2.)

3. That said court held that the fact that the Postmaster General "for a long time prior to December 1, 1925, had construed Section 4009, Revised Statutes, as giving him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails" "between the United States and a foreign port," does not affect petitioner's rights because "an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage," whereas said court should have held that such long continued course of dealing between the United States and the petitioner and other carriers of the mails was conclusive as to service subsequently rendered on the faith of that construction.

(Brief for petitioner, p. 3, par. 3; p. 4, par. 2.)

4. That said court held that in the absence of a contract entered into in accordance with the statutory requirements governing the carrying of domestic mails, "the only payment which may be authorized for the services is their reasonable worth" and that in the absence of proof that the services were worth more than has been paid therefor, the plaintiff "can not recover the amount claimed in this case or any other sum," whereas said court should have held that the petitioner having rendered the services without a written contract is entitled to a reasonable compensation for the services and that the amount fixed by the Postmaster General on the basis of the rates accepted by the parties for like services over a long period of years is *prima facie*, if not conclusive evidence, of reasonable compensation.

(Brief for petitioner, p. 4, par. 4; p. 5, par. 3.)

5. That said court held that the act of July 3, 1926, Chapter 793, 44 Stat. 900, to amend Section 4009 of the Revised

Statutes is not retroactive, but only fixes rates for the future, whereas said court should have held that said act in setting aside the rates fixed by the General Accounting Office decision not only made law for the future, but declared the concurrence of Congress in the construction by the Postmaster General of the existing Section 4009.

(Brief for petitioner, p. 4, par. 5; p. 5, par. 4.)

6. That said court decided as a conclusion of law that the petitioner is not entitled to recover and dismissed its petition, whereas said court should have held that the petitioner was entitled to recover and should have entered judgment in his favor for the amount shown to be due for the services as fixed by the Postmaster General, amounting to $30,370.94.

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Attorneys for Petitioner.

Office Supreme Court
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No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1928

LUCKENBACH STEAMSHIP COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

U.S. GOVERNMENT PRINTING OFFICE: 1929

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 764

LUCKENBACH STEAMSHIP COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 12–26) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered February 4, 1929. (R. 26.) The petition for writ of certiorari was filed March 12, 1929. Petitioner invokes the jurisdiction of this Court under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The sole question presented is whether for the transportation of mails between ports of the United States and the ports in the Canal Zone, that is, be-

tween New York City and Cristobal and/or Balboa, during the period from December, 1925, to June, 1926, inclusive, the petitioner was entitled to be paid at rates prescribed by the Postmaster General for the transportation of mails between the United States and a foreign port, or, to state it another way, whether the ports within the Panama Canal Zone were foreign ports within the meaning of Section 4009 Revised Statutes prior to its amendment by the Act of July 3, 1926.

THE STATUTES

The Act of May 12, 1910, c. 230, 36 Stat. 355, 366, contains the following provision:

> Hereafter the Postmaster General shall cause advertisements of all general mail lettings of each State and Territory to be conspicuously posted in each post office named in said advertisements for at least sixty days before the time of such general lettings, and no other advertisement of such lettings shall be required; but this provision shall not apply to any other than general mail lettings. (U. S. C., Title 39, Sec. 421.)

Section 4009, Revised Statutes, which authorizes the Postmaster General to pay for the transportation of mails between the United States and a foreign port, is as follows:

> For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States

steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported. (U. S. C., Title 39, Sec. 654.)

Section 4009, Revised Statutes, was amended by the Act of July 3, 1926 (c. 793, 44 Stat. 900), to read as follows:

(a) Except as provided in subdivision (b), for transportation of the mails, (1) between the United States or its Territories or possessions and any foreign country, (2) between the United States and its possessions or its naval or military forces abroad, or (3) between any such possession or naval or military forces and any other such possession or naval or military forces, the Postmaster General may allow, in the case of a vessel of the United States, compensation not in excess of the amount of the postage collected on the mail transported on such vessel, and in the case of a foreign vessel compensation not in excess of the sea transit rates prescribed from time to time by the Universal Postal Union Convention.

(b) The provisions of subdivision (a) of this section shall not limit the compensation for transportation of mail which the Postmaster General may pay under contracts entered into in accordance with the provisions of section 4007 of the Revised Statutes or section 24 of the Merchant Marine Act, 1920.

(c) In the case of mails transported between the United States or its Territories or possessions and any foreign country and in the case of mails transported between the United States and its possessions or its naval or military forces abroad, or between any such possession or naval or military forces and any other such possession or naval or military forces, payment for such transportation shall be made out of the appropriation for the transportation of foreign mails. (U. S. C. App., Title 39, Sec. 654.)

THE TREATY

The material provisions of the Treaty with the Republic of Panama which granted to the United States perpetual possession and control of the Panama Canal Zone are as follows:

ARTICLE II

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Carribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark with the proviso that the cities of Panama and Colon and the harbors adjacent

to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. * * *

ARTICLE III

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any of such sovereign rights, power or authority. (Treaties and Proclamations, 33 Stat. Pt. II, 2234; Treaties and Acts of Congress Relating to the Panama Canal, 1917.)

STATEMENT

This was a suit in the Court of Claims for the recovery of $30,370.94 which the petitioner claimed as the difference between the amount of compensation certified by the Postmaster General as due the petitioner for the transportation of various classes of mails of the United States between ports of the United States and the Canal Zone during the period December, 1925, to June, 1926, and the amount allowed and paid by the General Accounting Office for the same services. (R. 1, 4, 5–6, 7, 10–11.)

Up to December 1, 1925, the petitioner had transported mails of the United States between the United States and the Panama Canal Zone and had been paid for such services at rates approved by the Postmaster General for the transportation by United States steamships of mails *between the United States and a foreign port.* (R. 10.)

Petitioner also transported various classes of United States mail between the United States and the Panama Canal during the period December, 1925, to June, 1926, for which the Postmaster General approved vouchers aggregating the sum of $82,851.62 and transmitted the same to the General Accounting Office for direct settlement. (R. 10–11.) The accounts as approved by the Postmaster General were revised or reduced by the General Accounting Office and the petitioner was paid for said services only the sum of $52,480.68 allowed by the General Accounting Office, or $30,370.94 less than the amount approved by the Postmaster General. (R. 11.) The amount allowed and paid to petitioner was based upon the rate for the transportation by ocean transit of United States or foreign closed mails *between the United States and its possessions,* which, for the period involved, was to be fixed only by contract in accordance with law. In the absence of a contract covering the services for the period involved in this claim, it was held by the General Accounting Office that the petitioner was entitled to reasonable compensation only for

such transportation, which was determined by comparison with compensation paid under contracts for transportation of mails between the United States and its possessions to be $52,965.41. (R. 11.)

Since July 1, 1926, petitioner has transported mails of the United States on vessels of United States registry between ports of the United States and the Panama Canal Zone for which it has received payment at the rates prescribed by the Postmaster General for the transportation of mails on United States vessels between the ports of the United States and foreign ports, pursuant to the Act of July 3, 1926 (c. 793, 44 Stat. 900), which was construed as not being retroactive. (R. 11.)

If the mails transported by petitioner during the period from December, 1925, to June, 1926, inclusive, should be paid for at rates prescribed by the Postmaster General for the transportation of mails between ports of the United States and a foreign port prior to December, 1925, there is due the petitioner for the services performed during said period a balance of $30,370.94. (R. 12.)

The Court of Claims, in concluding that the petitioner was not entitled to recover, dismissed the petition (R. 12) and decided that (1) the Canal Zone under the Treaty with the Republic of Panama became and is a possession of the United States (R. 24); (2) an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can not ripen into a

binding usage (R. 24); (3) Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, was not retroactive but was a declaration of a new purpose and not the explanation of an old one (R. 25); (4) in the absence of a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for the services rendered by the petitioner, the only payment which may be authorized therefor is their reasonable value (R. 25–26).

ARGUMENT

I

THE CANAL ZONE, WITH THE EXCEPTION OF THE CITIES OF PANAMA AND COLON AND THE HARBORS ADJACENT TO SAID CITIES, IS A "POSSESSION" OF THE UNITED STATES

Under the provisions of the Treaty of February 26, 1904, between the Republic of Panama and the United States the Republic of Panama *granted* to the United States *in perpetuity* the use, occupation, and control of a strip of land and land under water ten miles wide across the Isthmus of Panama for the construction, maintenance, operation, sanitation, and protection of the Panama Canal; and also granted *all the rights, powers,* and *authority* within said zone which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located *to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.* (R. 14–15.)

Ever since the Republic of Panama granted to the United States all the rights, power, and authority within the Canal Zone which the United States would possess and exercise if it were the sovereign thereof to the entire exclusion of the exercise by the Republic of Panama of any such *sovereign rights*, power, or authority in said zone, the executive branch of the Government of the United States has always exercised and is now exercising all the rights, power, and authority of sovereignty in the Canal Zone as are now being possessed and exercised in all other territory or possessions which are under the control and jurisdiction of the United States. (R. 15–18.)

After the ratification of the Treaty, the President of the United States was authorized by the Act of April 28, 1904 (c. 1758, 33 Stat. 429), to take possession of and occupy on behalf of the United States the zone of land granted by the Republic of Panama. (R. 15.) Acting under the authority of said Act, the President by Executive Order of May 9, 1904, took possession of and occupied "on behalf of the United States, the Canal Zone and public land ceded by the Republic of Panama," and directed the Isthmian Canal Commission to enact a code of laws for the government of the Canal Zone, and specifically a law annulling any franchise which granted to any person the privilege of maintaining lotteries or any other gambling devices forbidden by the laws of the United States

and punishing the future exercise of the same by imprisonment or fine, or both. (R. 15–16.)

Ever since the United States was granted the perpetual use, occupation, and control of the Canal Zone, and acquired all the rights, power, and authority of sovereignty to the entire exclusion of the exercise thereof by the Republic of Panama, the Canal Zone has been considered and treated by the legislative branch of the Government as a "territory" or "possession" of the United States. (R. 18–21.)

Notwithstanding the rights, power, and authority granted to and exercised by the United States, petitioner contends here, as it did in the Court of Claims, that "the Canal Zone and its ports and harbors come within the designation of a 'foreign' port as defined by Section 4009 of the Revised Statutes." (Brief, p. 1.)

This contention was completely disposed of in the opinion of the Court of Claims, where it was said (R. 21):

> The plaintiff's contention that "The Canal Zone is no part of the United States," but that it is "foreign" within the meaning and intent of the laws of the United States, is not supported by the provisions of Articles II and III of the treaty between the United States and the Republic of Panama.
>
> The treaty under which the United States acquired in perpetuity the use, occupation, and control of the Canal Zone, granted to and vested in the United States forever all

the rights, power, and authority in and over said strip of land and lands under water which it could possess as the sovereign thereof to the entire exclusion of the exercise of any such sovereign rights, powers, and authority thereover by the Republic of Panama.

A grant, as used in a treaty, comprehends not only those concessions which are made in form but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession. (*Strother* v. *Lucas,* 12 Pet. 410, 435; *Bryant* v. *Kennett,* 113 U. S. 179, 192.)

A grant in its own nature amounts to an extinguishment of the rights of the grantor, and implies a contract not to reassert those rights. (*State of Illinois* v. *Illinois Central Railroad Company,* 33 Fed. 730–774.)

In all governments of constitutional limitations sovereign power is manifested in three ways: (1) By exercising the right of taxation; (2) by exercising the right of eminent domain; (3) through its police powers. It has been shown that all of these powers have been exercised by the executive and legislative branches of the Federal Government, and *the question of whether or not the Canal Zone is a possession of the United States has been definitely determined and the courts are bound by that determination.* (Italics ours.)

In its further discussion of the character of the title which the Republic of Panama granted to the United States in and to the Canal Zone, the Court of Claims finally concluded (R. 23):

> We think that it must be admitted that all doubt as to the character of the title of the United States in and to the Canal Zone has been conclusively removed by the decision of the Supreme Court in the case of *Wilson* v. *Shaw*, 204 U. S. 24, where it was contended that the United States had no power to construct the Panama Canal because the Canal Zone was no part of the territory of the United States. Mr. Justice Brewer, speaking for the Court (pp. 32 and 33), said:
>
> "Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, 'grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal.' By Article 3, Panama 'grants to the United States all the rights, power, and authority within the zone mentioned and described in Article 2 of this

agreement, * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.'

"Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of the Canal. *It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.*" (Italics ours.)

II

THE POSTMASTER GENERAL WAS NOT AUTHORIZED BY SECTION 4009 OF THE REVISED STATUTES TO PAY THE PETITIONER FOR THE TRANSPORTATION OF MAILS BETWEEN PORTS OF THE UNITED STATES AND THE CANAL ZONE THE COMPENSATION PRESCRIBED FOR THE TRANSPORTATION OF MAILS BETWEEN THE UNITED STATES AND A FOREIGN PORT

The petitioner in effect contends that regardless of whether the Canal Zone is considered "foreign territory" or a "possession" of the United States, the mere fact that certain officers of the Government have considered and treated the Canal Zone as "foreign territory," and the Postmaster

General, acting under Section 4009, has approved its accounts for payment on that basis for many years up to December, 1925, "should be determinative against a sudden departure from that rule made by the General Accounting Office in opposition to the views of the Postmaster General." (Brief, p. 5.)

We think that this contention of the petitioner was correctly disposed of by the Court of Claims when it said (R. 24) that—

> It is clear from what has been before stated that the Canal Zone under the treaty with the Republic of Panama became and is a possession of the United States, which has always exercised and is now exercising all the powers and rights of sovereignty in the Canal Zone as are being exercised in all of the territory or possessions which are under the control and jurisdiction of the United States, and that ever since it was acquired the Canal Zone has been considered and treated by the legislative branch of the Government as a possession of the United States, and that therefore the Postmaster General was not authorized to pay compensation based upon rates applicable to transportation of mails between the United States and a foreign port, under section 4009, supra, of the Revised Statutes.
>
> The plaintiff further contends that because the Postmaster General for a long time prior to December 1, 1925, had construed section 4009, Revised Statutes, as giv-

ing him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails between the United States and a foreign port, such construction should not now be disturbed, "especially when so to do would savor of bad faith and a violation of contract rights." We think the answer to this contention is that an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. (*Pierce* v. *United States,* 1 C. Cls. 270; *The Floyd Acceptances,* 7 Wall. 666.) In the case of *Houghton* v. *Payne,* 194 U. S. 88, it is stated (pp. 99–100) that—

" * * * it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States* v. *Graham,* 110 U. S. 219; *United States* v. *Finnell,* 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute."

III

SECTION 4009, REVISED STATUTES, AS AMENDED BY THE ACT OF JULY 3, 1926, CONTAINS NO PROVISIONS, EITHER EXPRESSED OR IMPLIED, WHICH MAKE IT RETROACTIVE SO AS TO AUTHORIZE THE POSTMASTER GENERAL TO PAY THE COMPENSATION CONTENDED FOR BY THE PETITIONER FOR TRANSPORTING MAILS BETWEEN THE UNITED STATES AND THE CANAL ZONE DURING THE PERIOD FROM DECEMBER, 1925, TO JULY, 1926, INCLUSIVE

In overruling the petitioner's contention (R. 2, Brief, p. 2) that the Act of July 3, 1926, amending Section 4009, Revised Statutes, "so as to allow compensation as herein claimed for services in such transportation of mails not only made law for the future, but was a declaratory statute intended to confirm the long-standing construction of Section 4009 of the Revised Statutes by the Post Office Department," the Court of Claims said (R. 25):

> Section 4009 of the Revised Statutes was amended by the act of July 3, 1926. (44 Stat. 900.) Plaintiff contends that the above act, amending section 4009, Revised Statutes, should be construed as a declaratory statute, making clear the meaning of section 4009, Revised Statutes. In other words, that the amendatory act was retroactive. It is well settled that statutes are not to be given a retroactive effect unless the legislative purpose so to do plainly appears. *United States* v. *Magnolia Petroleum Company,* decided February 20, 1928, 276 U. S. 160, wherein the Court said:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

Also in *White* v. *United States,* 191 U. S. 545, wherein it is said:

"Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men rather than review and affix new obligations to that which has been done in the past."

We can not accept the explanation that the act of July 3, 1926, supra, amending section 4009 of the Revised Statutes, was an elucidation of said section, and not an addition to it, as claimed by defendant (plaintiff), but we regard it as a declaration of a new purpose and not the explanation of an old one. Our view is that the amendatory act makes specific provision for the casus omissus in said section 4009, Revised Statutes. (See *Smietanka* v. *First Trust & Savgs. Bank,* 257 U. S. 602; also *Shwab* v. *Doyle,* 258 U. S. 529.

IV

IN THE ABSENCE OF A CONTRACT SPECIFYING THE RATES TO BE PAID FOR THE SERVICES, OR OF ANY EVIDENCE OF THE VALUE OF THE SERVICES, THE COURT OF CLAIMS HAS CORRECTLY CONCLUDED THAT PETITIONER CAN NOT RECOVER THE AMOUNT CLAIMED IN THIS CAUSE OR ANY OTHER SUM

The petitioner contends here as it did in the Court of Claims that "the approval by the Postmaster General of accounts for carrying the mails is conclusive upon the accounting officers and the courts," especially in the absence of any evidence contradicting the same. (Pet., p. 2.)

The Court of Claims was correct in its disposition of this contention when it said (R. 25–26):

> Prior to July 3, 1926, the compensation for transporting the mail between the United States and its possessions was required to be fixed by contractual agreement. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the plaintiff

can not recover the amount claimed in this case or any other sum.

CONCLUSION

This case presents no question of general importance; it depends upon its own peculiar facts, a decision on which would have no value whatever as a precedent because Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, authorizes the Postmaster General to pay the rates contended for by the petitioner. The Court of Claims has correctly decided the question in accordance with the facts and the decisions of this Court, and no useful purpose would be served by issuing the writ. The petition for certiorari should therefore be denied.

Respectfully submitted.

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APRIL, 1929.

○

FILE COPY

DEC 3 1
CHARLES ELMORE

No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1929

LUCKENBACH STEAMSHIP COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 49

LUCKENBACH STEAMSHIP COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 12–26) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered February 4, 1929. (R. 26.) The petition for writ of certiorari was filed March 12, 1929 (R. 26), and the writ was granted by this Court on April 29, 1929 (R. 27), under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The sole question involved is whether, for the transportation of mails between ports of the United States and ports in the Canal Zone, that is, spe-

cifically, between New York City and the cities of Cristobal and/or Balboa, during the period from December, 1925, to June, 1926, inclusive, the petitioner was entitled to be paid at rates prescribed by the Postmaster General for the transportation of mails between the United States and a foreign port; or, to state it another way, whether the ports of Cristobal and Balboa within the Canal Zone were foreign ports within the meaning of Section 4009, Revised Statutes, prior to the amendment of said section by the Act of July 3, 1926, and whether the waters of the Panama Canal were waters of the United States within the meaning of said statute.

STATUTES INVOLVED

The following statutes authorize the Postmaster General to make contracts for the transportation of the domestic mail of the United States:

Section 3941, Revised Statutes, as amended by the Acts of March 1, 1881, c. 96, Sec. 1, 21 Stat. 374, and May 12, 1910, c. 230, 36 Stat. 355, 366 (U. S. C. Title 39, Sec. 421):

> Hereafter the Postmaster General shall cause advertisements of all general mail lettings of each State and Territory to be conspicuously posted in each post office named in said advertisements for at least sixty days before the time of such general lettings, and no other advertisements of such lettings shall be required; but this provision shall not apply to any other than general mail lettings.

Section 3943, Revised Statutes, as amended by the Act of May 17, 1878, c. 107, Sec. 5, 20 Stat. 61, 62 (U. S. C. Title 39, Sec. 449):

> And the Postmaster General may contract with the owners or masters of steamships steamboats or other vessels plying upon the waters or between ports of the United States for carrying the mails upon such routes where no mail service has previously been performed, without advertisement for proposals therefor; but no contract for such new service shall be for a longer time than one year. * * *

Section 3949, Revised Statutes, as amended by the Act of May 18, 1916, c. 126, Sec. 6, 39 Stat. 159, 161 (U. S. C. Title 39, Sec. 429):

> All contracts for carrying the mail shall be in the name of the United States and shall be awarded to the lowest bidder tendering sufficient guaranties for faithful performance in accordance with the terms of the advertisement: *Provided, however,* That such contracts require due celerity, certainty, and security in the performance of the service; but the Postmaster General shall not be bound to consider the bid of any person who has willfully or negligently failed to perform a former contract.

Section 4009, Revised Statutes (U. S. C., Title 39, Sec. 654), which authorized the Postmaster General to pay specific rates for the transporta-

tion of mails between the United States and any *foreign* port, is as follows:

> For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported.

Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, c. 793, 44 Stat. 900 (U. S. C. App. Title 39, Sec. 654), reads as follows:

> (a) Except as provided in subdivision (b), for transportation of the mails (1) between the United States or its Territories or possessions and any foreign country, (2) between the United States and its possessions or its naval or military forces abroad, or (3) between any such possession or naval or military forces and any other such possession or naval or military forces, the Postmaster General may allow, in the case of a vessel of the United States, compensation not in excess of the amount of the postage collected on the mail transported on such vessel, and in the case of a foreign vessel, compensation not in excess of the sea transit rates prescribed from time to time by the Universal Postal Union Convention.

(b) The provisions of subdivision (a) of this section shall not limit the compensation for transportation of mail which the Postmaster General may pay under contracts entered into in accordance with the provisions of section 4007 of the Revised Statutes or section 24 of the Merchant Marine Act, 1920.

(c) In the case of mails transported between the United States or its Territories or possessions and any foreign country and in the case of mails transported between the United States and its possessions or its naval or military forces abroad, or between any such possession or naval or military forces and any other such possession or naval or military forces, payment for such transportation shall be made out of the appropriation for the transportation of foreign mails.

TREATY WITH REPUBLIC OF PANAMA

The material provisions of the Treaty between the United States and the Republic of Panama (see Treaties and Proclamations, 33 Stat., Pt. 2, pp. 2234–2235; also Treaties and Acts of Congress Relating to the Panama Canal, 1917, p. 14), which granted to the United States perpetual use, occupation, and control of the Panama Canal Zone, are as follows:

ARTICLE II

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land

under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. * * *

* * * * *

ARTICLE III

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any of such sovereign rights, power or authority.

STATEMENT

This was a suit in the Court of Claims for recovery of $30,370.94 claimed by the petitioner as the balance due it for transporting various classes of United States mails between the United States and ports in the Canal Zone and/or from ports in the Canal Zone to the United States during the period from December, 1925, to June, 1926, inclusive. (R. 3–7; 10–11.)

For a period of years and continuously to December 1, 1925, the Postmaster General had tendered and the petitioner had accepted and transported "mails of the United States and foreign mails for the United States consigned to the Port of Colon, Republic of Panama, and to the Canal Zone of the United States over the Isthmus of Panama." Upon approval of the Postmaster General the petitioner had been paid for said services at rates prescribed by the Postmaster General for the transportation by United States steamships of mails between the United States and a foreign port. (Finding IV, R. 10.)

During the period from December, 1925, to June, 1926, inclusive, which is the period involved in this case, the petitioner transported and delivered large quantities of various classes of mails of the United States to "ports at the Panama Canal and/or from ports at the canal to ports in the United States." (Finding V, R. 10.) For said services the Postmaster General prepared accounts and approved

vouchers aggregating $82,851.62 and transmitted the same to the General Accounting Office for direct settlement. The accounts as approved by the Postmaster General were revised by the General Accounting Office to aggregate $52,480.68. The petitioner was paid for said services only the sum of $52,480.68 allowed by the General Accounting Office, or $30,370.94 less than the aggregate sum approved by the Postmaster General. (Finding VI, R. 11.) The amount allowed and paid to the petitioner by the General Accounting Office was determined by comparison with compensation paid under contracts for the transportation of mails entered into under the provisions of Section 3943 of the Revised Statutes, as amended by the Act of May 17, 1878, *supra,* during the period involved (i. e., from December, 1925, to July 1, 1926). (See Sec. 3949 R. S. as amended by the Act of May 18, 1916, c. 126, 39 Stat. 159, 161, *supra;* Finding VI, R. 11.) There being no express contract covering the services for the period involved in this claim it was held by the General Accounting Office that the petitioner was entitled to reasonable compensation only for such transportation, which was determined by comparison with compensation being paid under contracts for the transportation of mails between the United States and its insular possessions to be $52,965.41. (Finding VI, R. 11.)

Since July 1, 1926, the petitioner has carried mails of the United States, on vessels of United

States registry, between ports of the United States and the Panama Canal Zone for which it has been allowed and paid compensation at rates prescribed by the Postmaster General for the transportation of mails on United States vessels between ports of the United States and foreign ports, pursuant to the express provisions of the Act of July 3, 1926, c. 793, 44 Stat. 900, amending Section 4009 of the Revised Statutes, which was construed by the General Accounting Office as not being retroactive. (Finding VII, R. 11.)

If the mails transported by the petitioner during the period from December, 1925, to June, 1926, inclusive, should be classified and paid for at rates prescribed by the Postmaster General for the transportation of mails between ports of the United States and a foreign port, as had been done prior to December, 1925, there would be due the petitioner a balance of $30,370.94 for the services performed during said period.

SUMMARY OF ARGUMENT

I. Under the provisions of the treaty between the Republic of Panama and the United States the cities of Cristobal and Balboa in the Canal Zone are ports of the United States.

II. The executive and judicial branches of the Government of the United States have always exercised and are now exercising all the powers and rights of sovereignty within the Canal Zone as are exercised in all other territory or possessions

which are under the control and jurisdiction of the United States.

III. Ever since it was acquired the Canal Zone has been considered and treated by the legislative branch of the Government as a possession of the United States and not as a foreign country.

IV. For the transportation of mails between the United States and the Canal Zone during the period December, 1925, to June, 1926, the Postmaster General was not authorized to pay compensation based upon rates applicable to transportation of mails between the United States and a foreign port.

V. The Act of July 3, 1926, c. 793, 44 Stat. 900, amending Section 4009, Revised Statutes, contains no provision which even impliedly makes it retroactive.

VI. In the absence of a contract specifying the rates to be paid for the services the petitioner is entitled to no more than what they are reasonably worth.

ARGUMENT

I

UNDER THE PROVISIONS OF THE TREATY BETWEEN THE REPUBLIC OF PANAMA AND THE UNITED STATES THE CITIES OF CRISTOBAL AND BALBOA IN THE CANAL ZONE ARE PORTS OF THE UNITED STATES AND THE WATERS OF THE PANAMA CANAL ARE WATERS OF THE UNITED STATES

The President of the United States was authorized to acquire for and on behalf of the United

States perpetual control of a strip of land extending from the Caribbean Sea to the Pacific Ocean, and the right to use the waters thereon, and to excavate, construct, and *to perpetually maintain,* operate, and protect thereon a canal, and *jurisdiction* over said strip and the ports at the ends thereof to make such police and sanitary rules and regulations as should be necessary to preserve order and the public health thereon, and to establish such judicial tribunals as might be necessary to enforce such rules and regulations, and for that purpose there was created the Isthmian Canal Commission. (Act of June 28, 1902, c. 1302, 32 Stat. 481.)

Pursuant to the above authority a treaty between the United States and the Republic of Panama to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific Oceans was concluded and signed at Washington on November 18, 1903. This treaty was ratified and proclaimed by the President of the United States on February 26, 1904. (Treaties and Acts of Congress Relating to the Panama Canal, 1917, p. 14; 33 Stat. 2234–2235.)

Under the provisions of Article II of that treaty the Republic of Panama granted to the United States in perpetuity the use, occupation, and control of a zone of land and land under water of a width of ten miles across the Isthmus of Panama for the construction, maintenance, operation, sanitation, and protection of the Panama Canal, with the proviso that the cities of Panama and Colon which were

included within the boundaries of that zone, should not be included within the grant; and under the provisions of Article III the Republic of Panama granted to the United States all the rights, powers, and authority within the zone described in Article II which the United States would possess and exercise if it were the sovereign of the territory within which the lands and lands under water are located to the entire exclusion of the exercise by the Republic of Panama of any such rights, power, or authority.

II

THE EXECUTIVE AND JUDICIAL BRANCHES OF THE GOVERNMENT OF THE UNITED STATES HAVE ALWAYS EXERCISED, AND ARE NOW EXERCISING, THE POWERS AND RIGHTS OF SOVEREIGNTY WITHIN THE CANAL ZONE

Subsequent to the ratification of the treaty with the Republic of Panama, the President was authorized to take possession of and occupy on behalf of the United States the territory since known as the Canal Zone. (Act of April 28, 1904, c. 1758, 33 Stat. 429.) By Section 2 of said Act it was provided that until the expiration of the 58th Congress, unless provision for the temporary government should sooner be made by the Congress, all military, civil, and judicial powers, as well as the power to make rules and regulations necessary for the government of the Canal Zone, and all rights, powers, and authority granted by the terms of the Treaty between the United States and the Republic of

Panama, should be vested in such person or persons and should be exercised in such manner as the President should direct for the government of said Zone, and for maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion. Acting under the authority granted in said Acts the President in his Executive Order of May 9, 1904, stated (Panama Canal—Executive Orders 1904–1914, p. 5):

> I have taken possession of and now occupy, on behalf of the United States, the canal zone and public land ceded by the Republic of Panama.
>
> * * * * *

Under authority of said Executive Order, there was enacted by the Isthmian Canal Commission a code of laws for the government of the Canal Zone. (Laws of Canal Zone, 1904–1914, Annotated 1921; Code of Civil Procedure, Canal Zone, 1907.) Under those statutes and Executive Orders, the Commission exercised general governmental authority until March 31, 1914, when it ceased to exist and was succeeded by the permanent organization authorized by the Panama Canal Act. (Act of August 24, 1912, c. 390, 37 Stat. 560.) Under the terms of this Act (Sec. 4; U. S. C. Title 48, Sec. 1305) "the President is authorized * * * to * * * govern and operate the Panama Canal and govern the Canal Zone." By Section 2 (U. S. C. Title 48, Sec. 1309) all laws, orders,

regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Zone and the construction of the Canal were ratified and confirmed as valid and binding until Congress should otherwise provide.

At the time the Act took effect there was a judicial establishment in the Zone which had been set up under Act No. 1 of the Isthmian Canal Commission. (Laws of Canal Zone, 1904–1914, Annotated 1921, p. 9.) By this Act the judicial power of the Government of the Canal Zone was vested in a supreme court, circuit courts, and municipal courts.

Prior to the passage of the Panama Canal Act of 1912 the Government of the Canal Zone was wholly an executive matter. All powers—executive, legislative, and judicial—were vested in the President. He alone, or through those acting by his authority, made, amended, and repealed laws, created and abolished courts, appointed and removed officials, and generally exercised absolute power over the zone. By Executive Order of April 2, 1907 (Panama Canal—Executive Orders 1904–1914, p. 106), the powers of the governor or chief executive of the Zone were vested in the Chairman of the Commission. Upon completion of the Canal this order was changed. Congress assumed the legislative power. While many matters were still left to be regulated by the President, by Section 2 of the Panama Canal Act the power formerly pos-

sessed by the President was abrogated. By Section 4 of the Act the President, when in his judgment the canal should be sufficiently advanced to render further services of the Canal Commission unnecessary, was authorized to discontinue the Commission and complete, govern, and operate the canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a governor and such other persons as he might deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone. He was authorized to appoint, by and with the advice and consent of the Senate, a governor at a salary of $10,000 per annum. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Canal and Canal Zone were to be appointed by the President or by his authority, removable at his pleasure, and the compensation of such persons was to be fixed by him or by his authority until Congress should by law regulate the same. (37 Stat. 561.)

By Section 7 of the Act, as amended by the Act of September 21, 1922, c. 370, 42 Stat. 1004 (U. S. C. Title 48, Sec. 1307), the authority of the Governor was defined as follows:

> That the Governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform

> all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided, all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing laws. * * *
>
> * * * * *

Under various provisions of the law now contained in Title 48 of the United States Code, the President is authorized to grant leases of public lands in the Zone (Section 1308); to make rules and regulations in matters of sanitation, health, and quarantine (Section 1310); to make and change rules and regulations for levying, assessing, and collecting ad valorem, excise, license, and franchise taxes (Section 1311); to make and enforce rules and regulations for the public roads and highways and for regulating, licensing, and taxing the use and operation of automobiles (Section 1312); to make rules and regulations to assert and exercise police power in connection with breaches of the peace or disorderly, indecent, or immoral conduct within the Zone (Section 1313); to make regulations for the operation of the Canal and the locks and approaches thereto (Section 1318); to provide a method for adjustment of claims arising out of personal injuries to employees (Section 1320); to

make rules and regulations touching the right of persons to enter or remain upon or pass over any part of the Canal Zone (Section 1321); to erect, maintain, and operate radio communications, dry docks, repair shops, yards, docks, wharves, etc., all moneys received from such operations to be subject to the provisions of existing law relating to the *deposit of other public funds of the United States* (Section 1323); to determine what towns shall exist in the Canal Zone and to subdivide said Zone into subdivisions to be designated by name or number and to clearly define their boundaries (Section 1341).

In the place of the courts created by the President, acting through the Commission, Congress created and established courts and defined their jurisdiction. (Act of September 21, 1922, c. 370, Section 1, 42 Stat. 1004.) The jurisdiction and procedure in admiralty in the District Court of the Canal Zone is the same as in the United States District Courts. (Sec. 8, Panama Canal Act, as amended by Act of 1922, Sec. 2, 42 Stat. 1005; U. S. C. Title 48, Sec. 1345.) The Circuit Court of Appeals for the Fifth Circuit has jurisdiction to review final judgments of the district court in all cases in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, in cases in which the value in controversy exceeds $1,000, in felony cases, and in cases in which the jurisdiction of the trial court is in issue. Such appellate jurisdiction is subject

to review by this Court, as in other cases, and is exercised by the Circuit Court of Appeals in the same manner as in reviewing final judgments of the District Courts of the United States. (Sec. 9, Panama Canal Act, as amended by Act of 1922, Sec. 3, 42 Stat. 1006; U. S. C. Title 48, Sec. 1356.) The district judge, district attorney, and the marshal are appointed by the President, by and with the advice and consent of the Senate of the United States, for a term of four years each and until their successors are appointed and qualified. (Sec. 8, Panama Canal Act, as amended by Act of 1922, Sec. 2, 42 Stat. 1006; U. S. C. Title 48, Sec. 1353.)

We submit that in view of these numerous and unequivocal evidences of the absolute dominion and control of the United States over the Canal Zone it can not reasonably be asserted that its two cities, Cristobal and Balboa, are for *any purpose* to be regarded as *foreign ports,* nor are the waters of the Panama Canal to be regarded otherwise than as waters of the United States.

III

EVER SINCE IT WAS ACQUIRED, THE CANAL ZONE HAS BEEN CONSIDERED AND TREATED BY THE LEGISLATIVE BRANCH OF THE GOVERNMENT AS A POSSESSION OF THE UNITED STATES AND NOT AS A FOREIGN COUNTRY

In the Act relating to the liability of common carriers by railroad to their employees it is provided—

> That every common carrier by railroad in the Territories, the District of Columbia, the

> Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions * * *. * * * (Act of April 22, 1908, c. 149, Sec. 2, 35 Stat. 65; U. S. C. Title 45, Sec. 52.)

In the Act known and referred to as the "White Slave Traffic Act" it is provided "That the term 'Territory' as used in this Act shall include the district of Alaska, the insular possessions of the United States, and the Canal Zone." (Act of June 25, 1910, c. 395, Sec. 7, 36 Stat. 825, 827; U. S. C. Title 18, Sec. 403.) In the Act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government thereof, it was enacted—

> That all laws and treaties relating to the extradition of persons accused of crime in force in the United States * * * and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States. (Panama Canal Act of August 24, 1912, c. 390, Sec. 12, 37 Stat. 560, 569; U. S. C. Title 48, Sec. 1330.)

In the National Defense Act, relating to the number of the National Guard of the United States, it

was enacted that "*Provided further,* That the word Territory as used in this Act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone." (Act of June 3, 1916, c. 134, Sec. 62, 39 Stat. 166, 198.) In the Naval Appropriation Act, 1918, Congress enacted that "the words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States." (Act of March 4, 1917, c. 180, 39 Stat. 1168, 1193.) In Section 1 of Title XIII, General Provisions, of the Espionage Act, it is enacted that "the term 'United States' as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of June 15, 1917, c. 30, 40 Stat. 217, 231; U. S. C. Title 50, Sec. 40.) In the Trading with the Enemy Act, it is provided: "The words 'United States,' as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof." (Act of October 6, 1917, c. 106, Sec. 2, 40 Stat. 411, 412.) In the Sabotage Act, it is provided: "The words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States." (Act of April 20, 1918, c.

59, Sec. 1, 40 Stat. 533, 534; U. S. C. Title 50, Sec. 101.) In the Act restricting travel during the war, it is provided: "That the term 'United States' as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of May 22, 1918, c. 81, Sec. 4, 40 Stat. 559; U. S. C. Title 22, Sec. 226.) In the Act for requisition of vessels, it is provided: "The term 'United States' includes any State, Territory, or District of the United States, the insular possessions, the Canal Zone, and all lands or waters subject to the jurisdiction of the United States." (Act of July 18, 1918, c. 157, Sec. 1(a), 40 Stat. 913.) The provisions of the National Prohibition Act were made applicable to the Canal Zone. (Act of October 28, 1919, c. 85, Sec. 20 of Title III, 41 Stat. 305, 322; U. S. C. Title 27, Sec. 63.) In the Act to regulate the entry of aliens into the United States, Congress provided: "That the term 'United States' as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of November 10, 1919, c. 104, Sec. 3, 41 Stat. 353, 354.)

By virtue of the authority vested in him by Section 3 of the Panama Canal Act of 1912 (37 Stat. 561; U. S. C. Title 48, Sec. 1304), in an Executive Order of December 5, 1912, the President of the United States declared all land and land under water within the limits of the Canal Zone to be

necessary for the construction, etc., of the Panama Canal, and directed the Isthmian Canal Commission to take possession, on behalf of the United States, of all such land and land under water and to extinguish, by agreement when practicable, all claims and titles of adverse claimants to the occupancy thereof. (Panama Canal—Executive Orders 1904–1914, p. 280.) Subsequently, Congress passed an Act removing a certain tract or lots of land situated in the town of Cristobal in said Canal Zone, and authorized the Panama Canal Railroad Company to sell, transfer, and convey said lots or tracts of land with all improvements thereon to any person or persons or association of persons and retain the consideration therefor for its own use. (Act of June 5, 1920, c. 239, 41 Stat. 948.) In the Act relating to the landing and operation of submarine cables in the United States it is provided: "That the term 'United States' as used in this Act includes the Canal Zone, the Philippine Islands, and all territory, continental or insular, subject to the jurisdiction of the United States of America." (Act of May 27, 1921, c. 12, Sec. 5, 42 Stat. 8; U. S. C. Title 47, Sec. 38.)

Attention is also called to Section 9 of the Act of August 21, 1916, c. 371, 39 Stat. 527, 529; U. S. C. Title 48, Sec. 1331, conferring special powers on the shipping commissioner and deputy shipping commissioners in the Panama Canal Zone.

The petitioner's contention (Brief, p. 7) that the Canal Zone ports are not ports of the United States,

but are "foreign ports" within the meaning of Section 4009 of the Revised Statutes, is not supported by the provisions of Articles II and III of the Treaty between the United States and the Republic of Panama, or by the course of legislation in Congress since the Canal Zone was acquired by the United States.

"A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States." *De Lima* v. *Bidwell,* 182 U. S. 1, 180. When the treaty between the Republic of Panama and the United States was ratified the Canal Zone ceased to be a "foreign country." *De Lima* v. *Bidwell, supra,* p. 196. It has been settled that Congress may acquire territory without incorporating it into the United States as an integral part thereof, and that until Congress shall see fit to incorporate territory ceded by treaty to the United States the territory so acquired shall be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation. *Rassmussen* v. *United States,* 197 U. S. 516, 520. See also *Downes* v. *Bidwell,* 182 U. S. 244, 268.

The Treaty under which the United States acquired in perpetuity the use, occupation, and control of the Canal Zone, granted to and vested in the United States forever all the rights, power,

and authority in and over the strip of land and lands under water which it could possess as the sovereign thereof, to the entire exclusion of the exercise of any such sovereign rights, powers, and authority thereover by the Republic of Panama.

Sovereignty is a political question. In *Jones* v. *United States,* 137 U. S. 202, 212, it is said that the question "who is the sovereign, *de jure* or *de facto,* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." (See also *Pearcy* v. *Stranahan,* 205 U. S. 257, 265, 273.)

The petitioner contends (Brief, p. 14) that because certain officers of the United States have for a long time considered and treated the Canal Zone as "foreign" that construction should not now be disturbed. In answer to this contention, we think it sufficient to say that the fact that certain officials of the United States have dealt with the Canal Zone on a basis which does not recognize it as a possession of the United States and treat it as anything but a possession of the United States is not conclusive of its status as a territorial possession of the United States. It is true that beginning with the decision in *Downes* v. *Bidwell,* 182 U. S. 244, this

Court has drawn a distinction in the application of the Constitution and Federal statutes between the organized territory of the United States and its possessions, and has in effect held that the Constitution and general statutes may not apply to its "possessions" or that they have a different application to its "possessions" than they have to the "territory of the United States." Consequently, various statutes, the enforcement of which is particularly within the jurisdiction of certain officers, may be so construed as in effect to treat a "possession of the United States" on the basis of "foreign" territory merely because it is neither affirmatively nor impliedly included in the particular statute, or statutes that may be properly enacted which effectively deal with such possessions on a distinctly different basis from that of the continental United States or of its territory. It can not be conceded, however, that these circumstances necessarily establish that the Canal Zone is not a possession of the United States, because, as has already been pointed out, Congress has enacted various statutes specifically applicable to the Canal Zone and which deal with it as a "possession of the United States."

The petitioner relies upon certain decisions and opinions of the Attorney General (Brief, p. 4) in support of its contention that "the contemporaneous and continued practical construction * * * 'for a period of years and continuously to December

1, 1925,' should not be departed from to the unsettlement of rights acquired under this construction." An examination of the opinion of the Attorney General (29 Op. 194, 196) shows that he merely concurred in the view that in order to obviate serious loss of time in the transportation of mails under contract between the United States and the ports of *Panama* and *Colon* in the Republic of Panama, the transferring of such mails to tenders in the harbors of Cristobal and Balboa in the Canal Zone to be thus transported to the ports of Panama and Colon in the Republic of Panama "unquestionably would be carrying the mails to a foreign port."

There can be no question that the Canal Zone was acquired and is held by the United States under a perpetual grant which for all practical purposes conferred upon and vested in the United States all the rights, power, and authority of a sovereign, and that the United States has exercised full sovereign rights over the Canal Zone ever since the strip of land was acquired.

We think that it must be admitted that all doubt as to the character of the title of the United States in and to the Canal Zone has been conclusively removed by the decision of this Court in the case of *Wilson* v. *Shaw*, 204 U. S. 24, where it was contended that the United States had no power to construct the Panama Canal because the Canal Zone was no part of the territory of the United States. This Court said (pp. 32, 33):

Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, "grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal." By article 3, Panama "grants to the United States all the rights, power and authority within the zone mentioned and described in article 2 of this agreement * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of this canal. *It is hypercritical to contend that the title of the United States is imperfect,* and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate. (Italics ours.)

IV

FOR THE TRANSPORTATION OF MAILS BETWEEN THE UNITED STATES AND THE CANAL ZONE DURING THE PERIOD DECEMBER, 1925, TO JUNE, 1926, THE POSTMASTER GENERAL WAS NOT AUTHORIZED TO PAY COMPENSATION BASED UPON RATES APPLICABLE TO TRANSPORTATION OF MAILS BETWEEN THE UNITED STATES AND A FOREIGN PORT

The authority to pay the rates contended for by the petitioner is found in Section 4009 of the Revised Statutes, which is as follows:

> For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported.

From what has already been said with respect to the status of the cities of the Canal Zone as ports of the United States, we think it has been shown that there is no merit in the contention of the petitioner that for the transportation of mails between the United States and the Canal Zone it should be compensated at rates applicable to the transportation of mails between the United States and a foreign port, and that there seems to be no necessity for any further discussion of this point.

The petitioner contends (Brief, p. 18) that because the Postmaster General for a long time prior to December 1, 1925, had construed Section 4009, Revised Statutes, as giving him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails between the United States and a foreign port, such construction should not now be disturbed. We think the answer to this contention is that an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. (*Peirce* v. *United States,* 1 C. Cls. 270; *The Floyd Acceptances,* 7 Wall. 666.) In the case of *Houghton* v. *Payne,* 194 U. S. 88, it is stated (pp. 99–100) that—

> it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States* v. *Graham,* 110 U. S. 219; *United States* v. *Finnell,* 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the postitive language of the statute. * * *

V.

THE ACT OF JULY 3, 1926, 44 STAT. 900, AMENDING SECTION 4009, REVISED STATUTES, CONTAINS NO PROVISION WHICH EVEN IMPLIEDLY MAKES IT RETROACTIVE

The petitioner contends (Brief, p. 22) that Section 4009, as amended, was not only law for the future but that it was a declaratory statute designed and intended to declare what was the true meaning of the old law, and in effect that it is retroactive. It has been uniformly held that unless the intention that a law is to have a retrospective operation is clearly evidenced in the law and its purposes the courts will presume that it was enacted for the future and not for the past. In *White* v. *United States,* 191 U. S. 545, this Court said (p. 552):

> Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past. * * *

The Government contends that while Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, authorized the Postmaster General to allow compensation not in excess of the amount of postage collected on mail transported on vessels of the United States between the United States and its

possessions, it had no retroactive force and therefore did not authorize the payment of compensation claimed by the petitioner for the service performed during the period December, 1925, to June, 1926, and that all prior claims should be adjusted in accordance with the provisions of law in force and effect at the time the services were performed.

A declaratory Act directing how a former Act shall be construed is inoperative as to the past although it is controlling as to the future. *United States* v. *Claflin,* 97 U. S. 546.

A statute is not made retroactive merely because it draws upon antecedent facts for its operation. *Cox* v. *Hart,* 260 U. S. 427.

A statute is presumed not to have been meant to act retroactively and should never receive such a construction if it is susceptible of any other, or unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied. *U. S. Fidelity Co.* v. *Struthers Wells Co.,* 209 U. S. 306, 314.

VI

IN THE ABSENCE OF A CONTRACT SPECIFYING THE RATES TO BE PAID FOR THE SERVICES, THE PETITIONER IS ENTITLED TO NO MORE THAN WHAT THEY ARE REASONABLY WORTH

Prior to July 3, 1926, the compensation for transporting the mail between the United States and its

possessions was required to be fixed by contract. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The petitioner has not seen fit to offer any evidence to prove that the amount allowed and paid (R. 11) by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the petitioner can not recover the amount claimed in this cause or any other sum.

In *United States* v. *Moore,* 95 U. S. 760, the plaintiff, who was a passed assistant surgeon in the Navy, demanded payment from the date of his original appointment as an assistant surgeon. This Court approved the view of the Navy Department that he was only entitled to the increased pay beginning five years after date of his appointment as a passed assistant surgeon and not five years from the date of his original appointment as an assistant surgeon. Clearly this case is not in point.

The case of *United States* v. *Johnston,* 124 U. S. 236, does not support petitioner's contention because in the instant case no settled accounts were reopened and set aside by the accounting officers.

In the case of *Alabama Great Southern Railroad v. United States,* 25 C. Cls. 30, affirmed in 142 U. S. 615, the question was whether Congress could set a limit to the responsibility of the Government for transporting the mails over the nonland-grant portions of claimant's railroad. Payments which had been made by previous Postmasters General for transportation of the mails over such roads to the extent that they were land-aided in whole or in part, were reopened by a succeeding Postmaster General many years after the services had been performed and orders were issued that the previous payments should be adjusted on a mileage basis which extended the land-grant obligation of the carriers to the entire length of their railroads in accordance with his interpretation of the Act of July 12, 1876, c. 179, Sec. 13, 19 Stat. 78, 82. Deductions were accordingly made from current accounts of the carriers to recoup the amounts which he determined had been overpaid for the services. In the instant case the Postmaster General certified the accounts for payment in accordance with his interpretation of Section 4009 for the period involved in this case. The Comptroller General merely refused to pay the amount certified by the Postmaster General for the reason that said amounts were not authorized by Section 4009. The Comptroller General did not disturb any payments that had been made on the certification of the Postmaster General prior to

December 1, 1925. Clearly this case is not in point.

It seems that *McCann* v. *United States,* 18 C. Cls. 445, supports the contention of respondent because in that case it was also decided that where it is shown that a voucher given for work done without a specified contract price is in fact for a sum larger than the value of the services performed, the claimant can not recover beyond the actual value, and if he has been paid that amount he can recover no more.

The question decided in *United States* v. *Jones,* 18 How. 92, certainly has no bearing on the question involved in this case because it is now provided by Section 236, Revised Statutes, as amended by the Act of June 10, 1921, c. 18, Sec. 305, 42 Stat. 20, 24 (U. S. C. Title 31, Sec. 71), and by Section 304 of the latter Act, that all claims and demands whatsoever by the Government of the United States or against it shall be settled and adjusted in the General Accounting Office and that any balances certified by that office shall be final and conclusive upon the executive branches of the Government.

CONCLUSION

For the reasons above set forth it is submitted that the question involved in this suit has been correctly decided in accordance with the facts found by the Court of Claims and the decisions of this

Court. The judgment of the Court of Claims, therefore, should be affirmed.

Respectfully submitted.

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DECEMBER, 1929.

U. S. GOVERN. MENT PRINTING OFFICE: 1929

SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1929.

Luckenbach Steamship Company, Petitioner, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[January 6, 1930.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This was a suit in the Court of Claims by the Luckenbach Steamship Company, petitioner, against the United States to recover $30,370.94 claimed by the petitioner as a balance due for transporting mails of the United States, in steamships of United States registry, between ports of the United States and ports in the Canal Zone from December 1, 1925, to June 30, 1926. Judgment went against the petitioner, 66 C. Cl. 679, and a petition to this Court for a review on certiorari was granted.

That the petitioner rendered the service stated and did so at the request of the Postmaster General is not questioned. The only matter in dispute is the true measure of compensation. The Postmaster General allowed the sum of $82,851.62 and transmitted approved vouchers therefor to the General Accounting Office for direct settlement; but that office reduced the allowance to $52,480.68 and caused this reduced sum to be paid to the petitioner. Thereupon suit was brought for the balance.

The Postmaster General in making his allowance proceeded on the theory that the compensation was to be determined according to section 4009 of the Revised Statutes; but the General Accounting Office regarded that section as inapplicable. If the section was applicable, the Postmaster General's allowance was right and should have been given effect by the Court of Claims.

Section 4009, which originally was part of the Act of June 8, 1872, (c. 335, § 269, 17 Stat. 316) consolidating and amending the statutes relating to the Post Office Department, reads as follows:

"Sec. 4009. For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster-General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage, and if by a foreign steamship or by a sailing-vessel, any sum not exceeding the sea postage, on the mail so transported."

The specific point of difference between the Postmaster General and the General Accounting Office was that the former treated the ports in the Canal Zone as foreign ports within the meaning of that section, while the latter regarded them as domestic ports.

The rights possessed by the United States within the Canal Zone were acquired from the Republic of Panama under the treaty of November 18, 1903, 33 Stat. 2234. The Zone has a width of ten miles and extends across the Isthmus of Panama and into the sea at either end for a distance of three marine miles from mean low water mark; but the cities of Panama and Colon and the harbors adjacent to them, although within the outer boundaries of the Zone, are expressly excepted therefrom by the second article of the treaty.

Whether the grant in the treaty amounts to a complete cession of territory and dominion to the United States or is so limited that it leaves at least titular sovereignty in the Republic of Panama is a question which has been the subject of diverging opinions[1] and is much discussed in the briefs. But for the purposes of this case the construction of the treaty in that regard need not be examined as an original question;—and this because a long continued course of legislative and administrative action has operated to require that the ports in the Canal Zone be regarded as foreign ports within the meaning of section 4009.

By the act of March 2, 1905, c. 1311, 33 Stat. 843, which came within less than two years after the treaty, Congress declared that the laws regulating the importation of merchandise and the entry of persons into the United States from foreign countries should apply to and control the importation of merchandise and the entry of persons from the Canal Zone into any State or Territory of the United States or the District of Columbia; and on September 8, 1909, 27 Op. 594, the Attorney General, in an opinion given to the

[1] 20 Am. Journal International Law, pp. 120-122; Isthmian Highway, Miller, p. 221; Wilson v. Shaw, 204 U. S. 24, 32-33.

Secretary of War, held that the Canal Zone was not a possession of the United States within the meaning of the tariff act of August 5, 1909, c. 6, 36 Stat. 11, imposing specified rates of duty upon various articles when imported from a foreign country into the United States or "into any of its possessions".

In 1911 the Postmaster General, being authorized by an act of March 9, 1891, c. 519, 26 Stat. 830, to arrange for the transportation of mails in American steamships between ports in the United States and foreign ports, submitted to the Attorney General the question whether, as respects mails largely intended for the cities of Colon and Panama, it would be within the letter and spirit of that act to arrange for the carrying of such mails from the ports of New York and San Francisco to the government docks at Cristobal and Balboa in the Canal Zone. The Attorney General responded in the affirmative, saying, 29 Op. 194, 196:

"It appears from the papers transmitted by you that it will be more convenient for the vessels contracting for this mail service to use principally the Government docks, which are being constructed at Cristobal on the Atlantic side and Balboa on the Pacific side; and the question arises whether by using these docks, which are in close proximity to but outside the limits of the cities of Colon and Panama and within the Canal Zone, the vessels would be carrying mails to foreign ports. It is stated in this connection that docking the large vessels at the cities of Colon and Panama would result in serious loss of time, and that the actual call at these places could be obviated by the use of a tender to meet the vessels upon entering the 'harbor adjacent to these ports' to receive and deliver the mail in Colon and Panama, the vessels then proceeding to the Government docks at Cristobal and Balboa.

"It has been held that the purpose of the act of March 3, 1891, is 'to promote the carriage of the ocean mails in ships of American register, and thereby to promote ocean commerce in American bottoms', and that this statute, 'designed to promote foreign commerce, is entitled to a liberal construction, with a view of carrying out the purpose of its enactment.' (20 Op. 98, 101).

"In my opinion, the service proposed is in substantial compliance with the letter and spirit of the statute, as being between 'ports of the United States' and 'ports of foreign countries.' The word 'port' is not limited in its application to the city which bears the same name, but has been defined as including the entire harbor, within its inclosures and projections of land, where ships take refuge and seek shelter. (Citing authorities.) Construing the word 'port' as synonymous with 'harbor' the vessels unquestion-

ably would be carrying the mails to a foreign port if they entered the harbor, since the treaty reserves to Panama not only the cities of Panama and Colon, but also 'the harbors adjacent to said cities.' In any event, I think that carrying the mails upon such vessels within such close proximity to said cities that they might safely be landed in a small boat would be a substantial compliance with the terms of the act."

By section 12 of an act of August 24, 1912, c. 390, 37 Stat. 569, Congress, while extending to the Canal Zone the laws of the United States relating to extradition and the rendition of fugitives from justice, declared that for such purposes, "and such purposes only", the Zone should be treated as an organized Territory of the United States; and by section 9 of an act of August 21, 1916, c. 371, 39 Stat. 529, Congress provided that the laws of the United States relating to seamen of vessels of the United States when "on foreign voyages" should apply to the seamen of all vessels of the United States when in the Canal Zone.

In 1925, the Department of Labor, construing a provision in the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, relating to seamen on board vessels arriving in the United States from "any foreign port or place", ruled that the ports in the Canal Zone should be deemed foreign ports in the sense of that act, Par. 4, Rule 6, Immigration Laws and Rules of 1925; and in 1926 the Comptroller General held that, as ports in the Canal Zone are considered foreign ports in the absence of special provision to the contrary, an alien seaman shipping on an American vessel from a port in the Canal Zone is limited in the matter of relief to such as may be extended to an alien seaman shipping on an American vessel from a foreign port. 5 Dec. Comp. Gen. 647.

True, there have been instances in which Congress specially provided that for particular purposes the Canal Zone should be treated as a Territory or possession of the United States. This is illustrated in the provision already cited relating to extradition and the rendition of fugitives from justice, and in the acts relating to the liability of carriers by railroad for injuries suffered by their employes, c. 149, 35 Stat. 65, to espionage, c. 30, title 13, 40 Stat. 231, and to sabotage, c. 59, 40 Stat. 533. But the purposes for which these special provisions were made were such that nothing was subtracted thereby from the force of the provisions before mentioned wherein for purposes connected with importation, im-

migration and ocean transportation between the United States and the Canal Zone Congress required that ports in the latter be regarded as foreign ports.

For a period of years and continuously to December 1, 1925, the Postmaster General tendered to the petitioner and the latter accepted for transportation in American steamships, and so transported for the United States, large quantities of mail between the United States and ports in the Canal Zone; and for this service the petitioner was paid the compensation intended by section 4009, —the Postmaster General and the accounting officers treating the ports in the Canal Zone as foreign ports in the sense of that section.

The service just described was continued without break into and through the period here in controversy—December 1, 1925, to June 30, 1926—and the Postmaster General, still treating the Canal Zone ports as foreign ports, allowed the same compensation as before. For this period, and this alone, the accounting officers declined to regard those ports as foreign ports. The service was continued after the period in question and for this later service the Postmaster General and the accounting officers concurred in allowing the compensation intended by section 4009, the accounting officers resting their assent upon an act of Congress of July 3, 1926, c. 793, 44 Stat., Part 2, 900.

It thus appears, as was said by the Postmaster General in a letter of July 23, 1926, to the petitioner, that the Post Office Department from the outset and continuously up to and through the period in question "considered the service to the Canal Zone as being in the same category as that to a foreign country" and approved compensation vouchers on that basis.

This recitation of pertinent legislative and administrative action demonstrates that this case is one in which we should apply the rule announced in *Alabama Southern R. R. Co.* v. *United States*, 142 U. S. 615, 621, where it was said:

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean

in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

Our conclusion also has obvious support in the act of July 3, 1926, *supra*, whereby section 4009 was reenacted in a form which undoubtedly puts ports in the Canal Zone on the same plane as foreign ports for the purposes of that section. The committee reports relating to that enactment show that it was particularly designed to meet and avoid the adverse ruling of the General Accounting Office and to continue the prior course of action respecting the measure of compensation to be paid for carrying mails between the United States and the Canal Zone; that it was intended to recognize, as the prior practice did, that for "all practical purposes" such mails "are foreign mails"; and that the purpose of the act was not to alter the rates paid to American ships, "but to clarify the law". House Report No. 1305, 69th Cong., 1st Sess.; Senate Report No. 1096, 69th Cong., 1st Sess.; House Report No. 1788, 70th Cong., 1st Sess.; Annual Report Postmaster General, 1927, p. 46.

We hold, therefore, that on the findings of the Court of Claims set forth in the record, judgment should have been given the petitioner for the balance of $30,370.94.

Judgment reversed.

A new copy.

Test:

Clerk, Supreme Court, U. S.